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The First Amendment and the Free Flow of Information: Towards A Realistic Right to Gather Information in the Information Age

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In a series of cases beginning in the 1960s and extending through the present time, the Supreme Court has struggled with determining the extent to which the First Amendment's protection for freedom of expression applies to the gathering of information for the purpose of engaging in speech. The resulting First Amendment "information-gathering" jurisprudence is anomalous in the general scheme of free speech law in that it generally disfavors "flows of information" of an inherently political nature, and the protection that is extended to information-gathering activities tends to be applied to one select type of information—"news." Professor McDonald argues that such a jurisprudence is inadequate to facilitate a "free flow of information and ideas" that is the hallmark of a society which places a premium on information and knowledge. Increasingly, the First Amendment is being invoked not only to protect the gathering of news by the institutional press, but also to protect academic and scientific research, information gathering by private research and policy organizations, and the collection and dissemination of information over the Internet. A logical extension of the "structural" theory of the First Amendment—which the Court has endorsed and which provides protection to the "essential processes" of communication necessary to facilitate an informed public discussion of important societal matters—would justify the recognition of a more uniform, but limited, First Amendment right to gather many different types of information of public concern. This right could be invoked only by those individuals and groups whom our society recognizes as performing an important and valued information-gathering and dissemination function as evidenced by certain objective criteria suggested in this Article.

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Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

U.S. Constitution, Amendment I

I. INTRODUCTION

In their most literal form, the Speech and Press Clauses of the First Amendment protect the freedom to speak and the freedom to publish using a printing press.[1] Obviously, such a literal construction of these clauses would have been inadequate to fully effectuate their purpose even in the days of their adoption, for they would not have even covered correspondence by hand-written letters (an essential mode of communication at that time). Hence, it is not surprising that the U.S. Supreme Court has eschewed such a literal reading, and, for the most part, has interpreted these clauses as redundant guarantees of the freedom of expression.[2]

But defining the precise scope of "freedom of expression" has been a more challenging task for the Court. Certainly such freedoms include the right to engage in expressive or communicative acts, such as speaking, writing, or publishing, and have also been construed to include less obvious forms of symbolic actions engaged in to convey a message (e.g., flag burning).[3] Even these freedoms, however, could be substantially undermined if the government were permitted to interfere with the receipt of these various communications. Thus, it is also not surprising that since 1943 the Court has maintained that freedom of expression encompasses a right to receive information and ideas.[4] And having established a right to communicate, and a correlative right to receive communications, later assertions by the Court that one of the chief purposes of the First Amendment is to protect the "free flow" of information and ideas to the

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[1] Although the U.S. Supreme Court has never squarely addressed the issue, the weight of scholarly commentary supports the view that in using the term "freedom of the press," the Framers were referring to the use of the printing press for publishing activities rather than the institution of the organized "press." *See, e.g.*, David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 446 (2002); *see also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 798 (1978) (Burger, C.J., concurring) ("[T]he history of the [Press] Clause does not suggest that the authors contemplated a 'special' or 'institutional' privilege.").

[2] *See infra* note 29 and accompanying text.

[3] *See infra* notes 30–34 and accompanying text.

[4] Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (declaring that the freedoms of speech and press "necessarily protect[] the right to receive [expression]"); *see also* Stanley v. Georgia, 394 U.S. 557, 564 (1969) (observing that "[i]t is now well established that the [First Amendment] protects the right to receive information and ideas").

public seemed to be a natural extension of these principles.[5] On this conception of freedom of expression, however, the Court's focus was not so much on protecting *individual* interests in expressing oneself or receiving another's expression, but rather on the *societal* interest in maintaining a sufficient flow of information to the public about matters of social concern in order to foster our system of informed self-governance.[6]

One problem with this system of maintaining a flow of important information to the public, however, was its vulnerability at the "head" of the flow: even if the government was prohibited from unduly interfering with the flow itself or its destinations, what would prevent the government from constricting its sources? In other words, did the First Amendment encompass a right to be free from undue governmental interference with the acquisition or gathering of information destined to enter that flow?[7]

In a series of cases brought primarily by the institutional press to test this proposition as one of society's most prominent information gatherers, the Court responded in a remarkably erratic and fragmented way. The Court initially held that there is *no* general First Amendment right to gather information in order to speak or publish it.[8] But then the Court retreated from this position in the area of newsgathering, asserting that the First Amendment *does* provide some protection for such activities.[9] Somewhat paradoxically, however, the Court later decided

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[5] *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."); Associated Press v. United States, 326 U.S. 1, 20 (1945) (asserting the First Amendment commands that "the government itself shall not impede the free flow of ideas").

[6] *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 77 (1964) (declaring that heightened First Amendment protection for speech about government representatives "protects the paramount public interest in a free flow of information to the people concerning public officials, their servants"); *see also id.* at 74–75 (The Court observed that "speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open. . . .'") (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)). *But cf.* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762–67 (1976) (explaining that protecting a "free flow of commercial information" to the public promotes both individual and societal interests).

[7] *Cf.* In re Mack, 126 A.2d 679, 689 (Pa. 1956) (Musmanno, J., dissenting) ("Freedom of the press means freedom to gather news, write it, publish it, and circulate it. When any one of these integral operations is interdicted, freedom of the press becomes a river without water."); Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1505 (1974) [hereinafter Harvard Note].

[8] *See* Zemel v. Rusk, 381 U.S. 1, 17 (1965), discussed *infra* at notes 69–78 and accompanying text.

[9] *See* Branzburg v. Hayes, 408 U.S. 665, 681 (1972), discussed *infra* at notes 79–99 and accompanying text.

that if information (whether "news" or otherwise) is being sought from governmental bodies about their actions or decisions, *no* First Amendment rights are implicated when access to that information is denied[10] unless the information concerns the conduct of criminal trials (in which case the strictest form of First Amendment scrutiny *does* apply to any governmental interference).[11] And most recently, the Court has suggested that a general newsgathering right *does not apply* in cases where it may conflict with laws of general application (such as tort, property, or contract laws).[12]

To illustrate how the lower courts are grappling with this inscrutable scheme, consider the following examples. When an educational tour group claimed a First Amendment right to travel to Cuba to acquire information to engage in the public debate about the Cuban embargo, the court held that no such rights were implicated because government restrictions on that travel merely interfered with the group's desire to gather information.[13] But when a law prohibited the news media from gathering exit-polling data,[14] or police officers prevented freelance journalists from videotaping a protest march[15] or photographing a traffic accident,[16] the law and police actions were held to infringe the media's First Amendment right of newsgathering. At the same time, alleged violations by the

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[10] *See* Pell v. Procunier, 417 U.S. 817, 834 (1974); Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974); Houchins v. KQED, Inc. 438 U.S. 1, 9 (1978); *see also* Los Angeles Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 40–41 (1999). These cases are discussed *infra* at notes 100–35 and 193–209 and accompanying text.

[11] *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980) and Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982), discussed *infra* at notes 144–76 and accompanying text.

[12] *See* Cohen v. Cowles Media Co., 501 U.S. 663, 669–70 (1991), discussed *infra* at notes 177-92 and accompanying text.

[13] *See* Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1441 (9th Cir. 1996) (asserting that "where a person seeks only to gather information, no First Amendment rights are implicated").

[14] *See* CBS, Inc. v. Smith, 681 F. Supp. 794, 802 (S.D. Fla. 1988) (holding that a state law prohibiting solicitation of voters within 150 feet of polling places violated the media's newsgathering and free speech rights in part because "[t]he gathering of news of political consequence is a necessary corollary to the freedom to report about politics and government") (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980)).

[15] *See* Fordyce v. City of Seattle, 55 F.3d 436, 438–40 (9th Cir. 1995) (holding that summary judgment in an action against police for interference with plaintiff's "First Amendment right to gather news" was improper).

[16] *See* Connell v. Town of Hudson, 733 F. Supp. 465, 469–71 (D.N.H. 1990) (holding that police violated the First Amendment right of the news media " 'to be in public places and on public property to gather information photographically or otherwise' " by barring photographs of fatal car accident on public streets (quoting Channel 10, Inc. v. Gunnarson, 337 F. Supp. 634, 638 (D. Minn. 1972))).

news media of *general* tort laws in connection with its coverage of a hostage standoff presented no First Amendment concerns.[17]

Similarly, when the news media and others sought records from the government about a defunct agency that had been devoted to maintaining racial segregation, no First Amendment rights were implicated.[18] Nonetheless, where access was sought to INS deportation proceedings conducted in the wake of the September 11 terrorist events, one court believed those proceedings were sufficiently like criminal trials to find a First Amendment right of access, while another court disagreed.[19] Given this scheme, it is little wonder that judges have complained about the "unsettled" and "fuliginous" nature of the legal principles in this area.[20] And legal scholars are not in general agreement about their application.[21]

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[17] *See* Risenhoover v. England, 936 F. Supp. 392, 404 (W.D. Tex. 1996) (rejecting First Amendment defense of news media against claims of negligence related to the injury and death of federal agents during the Branch Davidian standoff at Waco, explaining that "the press must abide by laws of general applicability even though such laws may impose an incidental burden upon the ability to gather or report the news").

[18] *See* ACLU of Mississippi v. Mississippi, 911 F.2d 1066, 1072 (5th Cir. 1990), *aff'd* 84 F.3d 784, 787 (5th Cir. 1996) (observing that "there is no constitutional right to have access to particular government information, or to require openness from the bureaucracy") (quotation omitted).

[19] *Compare* Detroit Free Press v. Ashcroft, 303 F.3d 681, 709 (6th Cir. 2002) (finding First Amendment right to attend deportation proceedings), *with* North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 201, 204–21 (3d Cir. 2002) (disagreeing with *Detroit Free Press* and rejecting right of access). Although these decisions created a direct conflict in the U.S. Courts of Appeal, the Supreme Court recently declined to resolve it. *See* North Jersey Media Group v. Ashcroft, 123 S. Ct. 2215 (2003) (denial of certiorari). Although it is impossible to determine the basis for the Court's inaction, one possible reason may be the difficulties inherent in delineating the scope of a First Amendment right of access to government-controlled information as the Court currently defines it. *See infra* notes 268–73 and accompanying text.

[20] *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 29 (1986) (Stevens, J., dissenting) (In dissent, Justice Stevens argued in the Court's last major case dealing with First Amendment right of access to government information, that "[i]t is unfortunate . . . the Court neglects this opportunity to fit the result in this case into the body of precedent dealing with access rights generally. I fear that today's decision will simply further unsettle the law in this area."); El Dia, Inc. v. Hernandez Colon, 963 F.2d 488, 494 (1st Cir. 1992) (describing, in a right of access case, the First Amendment issues as "fuliginous").

[21] *Compare* A. Michael Froomkin, *The Death of Privacy*, 52 STAN. L. REV. 1461, 1508 (2000) (asserting that "both the Supreme Court and appellate courts have interpreted the First Amendment to encompass a right to gather information"), *with* Eugene Cerruti, *"Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 246 (1995) (stating that whenever a "First Amendment right to gather information . . . was squarely presented [to] the Court, the proponents of the putative right-to-gather were emphatically denied"). *Compare also* C.

In essence, the Court has created a legal scheme governing a First Amendment right to gather information that is not only fragmented and inconsistent, but appears to be in substantial tension with two cardinal tenets of free speech law. First, the gathering of information from government sources (except for criminal courts) that directly concerns their activities and decisions is generally afforded less constitutional protection than the gathering of information from non-governmental sources. This appears to turn the First Amendment's "core" protection for speech of a political or governmental nature on its head. Second, the Court appears to be making the very existence of a First Amendment "right" depend on the type or content of the information being gathered: at a general level whether the information gathering concerns internal government affairs versus other types of information, and within these two general categories whether it concerns the affairs of one branch of government versus another, or "news" versus other types of information.[22] This seems to be in substantial tension with established First Amendment principles that generally require government regulation of conduct associated with speech to be neutral with respect to the content of the speech at issue.[23]

Although commentators have certainly scrutinized various aspects of the constitutional scheme governing a First Amendment right to gather information—focusing on the question of the public's "right to know" government-controlled information[24] *or* First Amendment protection for general newsgathering

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Thomas Dienes, *Trial Participants in the Newsgathering Process*, 34 U. RICH. L. REV. 1107, 1125 (2001) (asserting that "[t]here is little question today that the First Amendment protects newsgathering"), *with* Anderson, *supra* note 1, at 485 (observing that the "press's ability to gather news is protected almost entirely by nonconstitutional means"), *and* Erwin Chemerinsky, *Protect The Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143, 1157 (2000) (noting that "the Supreme Court and the lower courts consistently have rejected First Amendment protection for newsgathering").

[22] For purposes of this Article the term "news," as commonly understood in the context of newsgathering and reporting, shall refer to information about recent or current events of general or public interest. *See, e.g.*, Jenkins v. Dell Publ'g Co., 251 F.2d 447, 451 (3d Cir. 1958).

[23] *See infra* notes 223–25 and accompanying text. Of course, even under general First Amendment principles the Court has sanctioned various content-based categories of lesser-protected or disfavored speech—such as commercial speech, libel, incitement, and obscenity—where the government is given greater leeway to regulate the content of the speech (and *a fortiori* conduct associated with that speech). But it is clear that the "information gathering" categories created by the Court are not tied to such "low value" speech distinctions, but instead discriminate based on the type of otherwise fully-protected speech that is at issue.

[24] *See, e.g.*, Lillian R. BeVier, *Like Mackerel in the Moonlight: Some Reflections on* Richmond Newspapers, 10 HOFSTRA L. REV. 311, 314 (1982) [hereinafter *Mackerel in Moonlight*]; Lillian R. BeVier, *Justice Powell and The First Amendment's 'Societal Function': A Preliminary Analysis*, 68 VA. L. REV. 177, 177–178 (1982) [hereinafter

activities[25]—none appears to have examined whether this body of law makes sense as a whole.[26] This Article seeks to fill that gap. In Part I, I will explore in

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Justice Powell]; Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482, 484 (1980) [hereinafter *Informed Public*]; Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 489–95 (1985); Cerruti, *supra* note 21, at 245–46; Mary M. Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. 690, 698 (1984); Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 929 (1992); Steven Helle, *The News-Gathering/Publication Dichotomy and Government Expression*, 1982 DUKE L.J. 1, 3 (1982); Anthony Lewis, *A Public Right to Know About Public Institutions: The First Amendment as Sword*, 1980 SUP. CT. REV. 1, 8–9; *see generally* David M. O'Brien, *The First Amendment and the Public's "Right to Know,"* 7 HASTINGS CONST. L.Q. 579 (1980); Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889 (1986).

[25] *See generally* Randall P. Bezanson, *Means and Ends and* Food Lion*: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895 (1998); Vincent Blasi, *The Checking Value in First Amendment Theory*, 3 AM. B. FOUND. RES. J. 521, 591–611 (1977) [hereinafter *The Checking Value*]; Chemerinsky, *supra* note 21; Tom A. Collins, *The Press Clause Construed in Context: The Journalists' Right of Access to Places*, 52 MO. L. REV. 751 (1987); Dienes, *supra* note 21; Eric B. Easton, *Two Wrongs Mock A Right: Overcoming the* Cohen *Maledicta That Bar First Amendment Protection for Newsgathering*, 58 OHIO ST. L.J. 1135 (1997); Rodney A. Smolla, *Qualified Intimacy, Celebrity, and the Case for a Newsgathering Privilege*, 33 U. RICH. L. REV. 1233 (2000); Roy S. Gutterman, Note, *Chilled Bananas: Why Newsgathering Demands More First Amendment Protection*, 50 SYRACUSE L. REV. 197 (2000).

[26] The closest anyone has come to analyzing all aspects of a right to gather information as a unitary body of law is the late prominent First Amendment scholar Thomas I. Emerson. In his article *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1 (1977), Professor Emerson purports to "outline issues" associated with a First Amendment "right to know" that consists of both a right to gather information and a right to receive information and ideas. *See generally id.* Together with the right to communicate, all of these rights constitute a complete "system of freedom of expression" similar to the "information flows" discussed in this Article. As part of his analysis, Professor Emerson explores issues associated with obtaining information from both *governmental* and *private* sources. *See generally id.* Where pertinent, these views will be explored in the relevant sections of this Article. One apparent gap in Professor Emerson's analysis concerns issues presented by governmental interference with a person's right to gather information from the *public domain*, such as when the police interfere with a journalist's efforts to photograph a disaster scene or other public event. *See supra* notes 15–16 and accompanying text. Collectively, these three sources of information—governmental or public entities, private parties, and the public domain—would appear to constitute the universe of sources of information from which a person could conceivably draw (apart of course, from his or her own thoughts and experiences). Prior to the decisions in many of the key Supreme Court cases relevant to this issue, another commentator purported to write about a general First Amendment right to gather

more detail the nature of a right to gather information and how it fits (or does not fit) within the general scheme of First Amendment protection for freedom of expression. As I will discuss, the cautious ambivalence the Supreme Court and lower courts generally demonstrate with regard to such a right is understandable. On the one hand, information gathering frequently consists of *non-expressive* conduct that bears a more attenuated link to acts of *expression* than other forms of non-expressive conduct accorded First Amendment protection. On the other hand, the government could abridge flows of important information to the public by simply restricting or burdening antecedent conduct that generates those flows.

In Part II, I will describe the evolution of the Supreme Court decisions involving a First Amendment right to gather information. I will demonstrate that many of the inconsistencies in its information-gathering jurisprudence have resulted from the Court's myopic fear of granting perceived privileges to the news media as a private institution, which caused it to lose sight of the functional role played by the press as a vital information-gathering agent of the public. Lower court treatment of a right to gather information will also be discussed. In Part III, I will analyze the problems presented by the Court's jurisprudence in this area. Ironically, one problem is that the First Amendment protection lower courts have conferred on information-gathering activities tends to be limited to the gathering of "news." In today's information society, where academic and scientific researchers, non-governmental organizations such as "think tanks" and related public policy groups, and other information-oriented enterprises are playing increasingly important roles in conveying information to the public, such a limited scope of protection is anachronistic and inadequate to meet current societal needs.[27]

Finally, in Part IV of this Article, I will outline some preliminary proposals for creating a cohesive and workable right to gather information under the First Amendment that would apply regardless of the context in which such a claim was made. I will propose that instead of an "all-or-nothing" approach to such a right, both of which the Court has espoused in different situations, an intermediate position supported by the express provisions of the First Amendment—and in

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information but limited his or her analysis to "the scope of the public and press right to gather *news* . . . ." Harvard Note, *supra* note 7, at 1510 (emphasis supplied).

[27] *See infra* notes 43–47 and accompanying text. Recent advances in science and technology can be expected to result in a proliferation of new types of First Amendment information-gathering claims. For instance, recent laws restricting access to digital information transmitted on the Internet or in other electronic media, and proposed laws barring certain forms of scientific research in the area of biomedical science, are already generating such claims. *See id.* Another problem with limiting an information-gathering right to the "press" is that it is becoming increasingly difficult in the age of "media and content convergence" to determine who or what the "press" is. *See* Anderson, *supra* note 1, at 435–46.

particular the Press Clause—is the best way to meet society's need to preserve meaningful flows of information.

Preliminarily, I will contend that recognizing a general right to gather information in order to engage in "speech" would be unduly broad and unmanageable, encouraging an undesirable increase in social conflict involving First Amendment values and other interests valued by society. However, I will argue that a reinvigorated and expanded interpretation of the Press Clause, one that accords a limited right to gather information to *all* individuals and groups that society recognizes as performing legitimate and valuable *information-gathering and dissemination functions* today (whether news media or not), is the best way to preserve and facilitate modern flows of quality information.[28] Moreover, I will propose some basic criteria for identifying such individuals or groups. Such an approach would align this area of the law with traditional freedom of expression principles—making the *existence* of the right depend solely on First Amendment values (to then be weighed against competing societal interests in particular cases), rather than having it depend on whatever competing interests happen to be

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[28] I am not the first to propose an independent and special role for the Press Clause in protecting the "system" of freedom of expression. Prominent scholars, jurists, and others have previously argued both for and against special First Amendment protections for the institutional news media—for its newsgathering, editorial, and/or publication functions—based on the text and history of that Amendment, or the structure and policies underlying the Constitution. However, this Article takes a much different approach. First, it proposes a return to the traditional conception of the Press Clause as protecting all in today's society—and not just the news media—who perform a recognized and valued function in gathering and disseminating important information to society. Second, it proposes an independent role for that Clause that is limited to the information-gathering stage of the publication process, and not the editing/analysis or dissemination phases. These latter two phases appear to be adequately protected by traditional First Amendment principles, and there seems to be little reason to distinguish between "publishers" and other speakers in this regard. But in the information-gathering stage of the process—where First Amendment protection is being sought for non-expressive types of conduct—this Article will argue that there is good reason to withhold such protection for "ordinary speakers" while granting it on a limited basis to those who provide a *quid pro quo* to society in the form of facilitating valuable flows of information. *See infra* Part IV. For some of the more notable articles exploring the merits of unique Press Clause protection for the news media (both pro and con), see generally Anderson, *supra* note 1; David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983); C. Edwin Baker, *Press Rights and Government Power to Structure the Press*, 34 MIAMI L. REV. 819 (1980) [hereinafter *Press Rights*]; Randall P. Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977); David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77 (1975); Melville B. Nimmer, *Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 641 (1975) [hereinafter *Freedom of the Press*]; Melville B. Nimmer, *Speech and Press: A Brief Reply*, 23 UCLA L. REV. 120 (1975); Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631 (1975); William W. Van Alstyne, Comment, *The Hazards to the Press of Claiming a "Preferred Position,"* 28 HASTINGS L.J. 761 (1977).

present in a given context (as the Court seems to have done). With such a revitalized interpretation of the Press Clause, the First Amendment could truly serve as a protective aqueduct for facilitating important flows of information within society—from source to destination.

I. RELATIONSHIP OF A RIGHT TO GATHER INFORMATION TO THE FIRST AMENDMENT GENERALLY

To properly evaluate a First Amendment right to gather information, it is important to assess it against the general backdrop of the Court's freedom of expression jurisprudence. As stated earlier, the Court has interpreted the First Amendment much more broadly than its explicit protection for speech and publishing activities might suggest. Although the Court has mainly treated the Press Clause as a superfluous subset of the Speech Clause,[29] it has construed the latter clause to cover most forms of human conduct engaged in for the purpose of expressing or communicating information or ideas.[30] This includes not only acts

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[29] *See, e.g.*, Anderson, *supra* note 1, at 430 ("Most of the freedoms the press receives from the First Amendment are no different from the freedoms everyone enjoys under the Speech Clause."); *id.* at 448–50 (observing that while at times during the mid-20th century "the Court invoked the Press Clause . . . and appeared to rely on it . . . to protect freedom of the press," over the last 30 years "the Court seemed to lose its enthusiasm for the Press Clause . . . [and has] treated media cases as free-speech cases rather than free-press cases"); RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 22-b21 (3d ed. 1996 & Supp. 2001) (asserting that "on the whole, the Supreme Court has been reluctant to carve out unique meaning for the Press Clause, as distinguished from the Speech Clause").

[30] *See* SMOLLA, *supra* note 29, at 11-2 ("The Supreme Court has long recognized that First Amendment protection for speech extends to more than the use of language, encompassing communication through the use of nonlanguage symbols") (footnote omitted); *id.* at 11-5 (nonverbal conduct is protected where an actor "undertake[s] the action to communicate"). Traditionally, the First Amendment's protection for "[f]ree speech has been thought to serve three principal values: advancing knowledge and 'truth' in the 'marketplace of ideas,' facilitating representative democracy and self-government, and promoting individual autonomy, self-expression and self-fulfillment." KATHLEEN M. SULLIVAN & GERALD G. GUNTHER, FIRST AMENDMENT LAW 4 (David L. Shapiro et al. eds., 1999); *cf. generally* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 593 (1982) (acknowledging the legitimacy of these values, but arguing that they are all encompassed by one overarching value of "individual self-realization"). A First Amendment right to gather information for the purpose of engaging in expression would appear to promote values similar to those traditionally associated with free speech. *See* Emerson, *supra* note 26, at 2 (stating that the rights to receive and obtain information serve "much the same function in our society as the right to communicate"). However, one could make a strong case that the discovery of truth and knowledge is especially furthered by an information-gathering right. Clearly, the more speech is based on "good" information or facts, the more likely that speech will be to accurately depict reality. *See infra* notes 65–66 and accompanying text.

of speaking or communicating in other verbal or aural forms (e.g., singing or orchestral performances), but also the acts of representing things visually in writings, pictures or other works of art, or audio-visually in multiple formats such as text, sound, graphics, pictures, or videos that are transmitted via electronic means of communication (i.e., "multimedia").[31] Such protection includes not only the "speech" itself (i.e., the making or use of the symbols or representations), but also conduct that is necessary for, or integrally tied to, acts of expression. Thus, the Court has typically analyzed governmental restraints on such conduct (e.g., the distribution of handbills, acts of door-to-door solicitation, or operation of sound amplification equipment) as restraints on the speech itself.[32] So even conduct that is not inherently expressive in itself (and can even be characterized as "non-expressive" when viewed in isolation), is typically accorded First Amendment protection provided it is intimately bound up with an expressive act.[33]

The Court has also extended protection to conduct less commonly associated with acts of communication or expression, provided the conduct is engaged in with the intent to express or communicate a message. For instance, the Court has held that the act of burning a draft card or U.S. flag as a vehicle for political protest is entitled to some measure of First Amendment protection.[34] In such

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[31] *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."); Kaplan v. California, 413 U.S. 115, 119–20 (1973) ("[P]ictures, films, paintings, drawings, and engravings . . . have First Amendment protection.").

[32] *See* Watchtower Bible and Tract Soc'y of New York, Inc. v. Vill. of Stratton, 536 U.S. 150, 168–69 (2002) (door to door solicitation); *Ward*, 491 U.S. at 791 (regulation of use of bandshell sound equipment); Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (handbill distribution). Of course, when the government regulates conduct bound up with expression on a content-neutral basis as a time, place, or manner restriction on the affected speech, the government is generally accorded more leeway in regulating such speech than when the government regulates speech on the basis of its content. *See, e.g.*, *Ward*, 419 U.S. at 791–803 (upholding sound equipment regulations under an "intermediate" level of scrutiny). *But cf. Watchtower Bible and Tract Soc'y*, 536 U.S. at 164–69 (declining to analyze a licensing requirement for door to door solicitation activities as a time, place, or manner restriction given the amount of speech restricted in comparison to competing governmental interests).

[33] Of course, according speech or conduct First Amendment "protection" does not mean that a person will always have a right to engage in it. It simply means that a person may seek to have a court scrutinize the propriety of government restraints on such acts under established First Amendment principles. The government interests at stake in a given case may be found to "trump" the First Amendment rights being asserted.

[34] *See* Texas v. Johnson, 491 U.S. 397, 418–19 (1989) (flag burning); United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (draft card burning). As with content-neutral time, place, or manner restrictions on speech, content-neutral regulation of the "conduct" aspect of expressive or symbolic conduct is also subject to a less rigorous level of constitutional scrutiny than would be any content-based regulation of the expressive

instances, conduct not automatically associated with expression becomes "expressive" by virtue of the speaker's intent to engage in such conduct in a symbolic manner.

Thus, the Court has construed the First Amendment broadly to cover conduct that is either expressive itself—by its nature or because engaged in for an expressive purpose—or intimately related to acts of expression. However, this does not exhaust the scope of the Amendment's free speech guarantees; the Court has also pulled certain forms of conduct within its ambit not because they are expressive in nature, but rather because they are deemed necessary to accord full meaning and substance to those guarantees. Thus, as mentioned earlier, the Court has held that the First Amendment protects the "right to receive information or ideas," not only to vindicate a speaker's right to speak but also an independent right of listeners to receive the communication.[35] Similarly, the Court has recognized a "right not to speak," in recognition of the fact that freedom of expression would not be complete if it were limited to the right to say what one desired; full freedom also encompasses the right not to engage in expression against one's will.[36] Also, the Court has recognized the right of putative speakers to gain access to certain types of government property for the purpose of engaging in expressive activities, even though gaining physical access to a place is typically not an expressive act.[37] Finally, the Court has recognized a right to associate with other members of society, not because such activities are

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component. *See generally O'Brien*, 391 U.S. at 376–82 (upholding draft card regulations under an "intermediate" level of scrutiny).

[35] In other words, what is protected by the First Amendment is "speech" itself (its generation, transmission, and receipt), and not just acts of "speaking." *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both."); *id.* at 757 n.15 (rejecting certain limitations on "the independent right of the listener to receive the information sought to be communicated"); *see also* Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion) (asserting that the right to receive information "is an inherent corollary of the rights of free speech and press . . . in two senses. First, the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them . . . . More importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom") (emphases in original). See *infra* notes 59–67 and accompanying text for a discussion of how the right to receive information and ideas differs from a claimed right to gather information.

[36] *See* SMOLLA, *supra* note 29, at 4–19 ("The First Amendment generally prohibits government from forcing a speaker to profess statements or beliefs against the speaker's will. 'At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence.'") (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994)).

[37] *See, e.g.*, Arkansas Ed. Television Comm. v. Forbes, 523 U.S. 666, 676–78 (1998) (describing the Court's public fora doctrine).

necessarily expressive in and of themselves (although they can be in some situations), but rather because they facilitate the expressive activities of people that associate together.[38] In sum, the Court has recognized that there must be corollary rights to engage in certain forms of "non-expressive" conduct for the First Amendment's free speech guarantees to be fully realized.

Returning to the "free flow of information" metaphor, a "flow" of anything—be it a river of water or information—is generally characterized by a source or origin of the flow, the flow itself, and its destination. Since First Amendment protection plainly extends to the latter two aspects of information flows, why is there so much uncertainty and ambivalence about extending its protection to the "wellspring" of the information? After all, without protection of their sources, won't information flows dry up and freedom of expression lose meaning? And don't the demands of symmetry and logic dictate that if non-expressive conduct at one end of the flow is entitled to protection (the receipt of information), then non-expressive conduct at the other end (the acquisition of information) should be protected as well?[39]

The answer to these questions must begin with an examination of the nature of information gathering. What exactly does this mean? Certainly not all communications or expression require information gathering at the front end of the process in order to give them content or substance. For instance, if one experiences pangs of hunger and relates that feeling to someone else, it is difficult to say the speaker has gathered any information to engage in that communication except perhaps in a very narrow, "internal" sense—it is possible to say that the speaker's brain has "gathered" signals from its stomach that it is low on food, which then formed the basis for the subsequent communication. Similarly, if a person has a dream or comes up with a very original idea that she describes to another, again it is difficult to say that any affirmative information gathering has occurred. But in this situation, unlike a wholly internally-generated sensation, it is probably safe to say that most original ideas, and even dreams to some extent, have some basis in information that has been acquired from one's external environment (e.g., experiences, observations, conversations, etc.). Thus it appears that the notion of information gathering, at least in the First Amendment context,

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[38] *See, e.g.*, SULLIVAN & GUNTHER, *supra* note 30, at 369–70 ("The right to associate reflects the notion that individual rights of expression can be made more effectual by collective action. . . . The Court has tended to view the right of association as dependent on underlying individual rights of expression; there is no right of association in the abstract.") (citations omitted).

[39] As will be discussed more fully below, although information-gathering activities may consist of some expressive activities such as acquiring information through a conversation with someone, any such expression is often incidental to the generally non-expressive nature of the information-gathering process. *See infra* notes 53–56 and accompanying text.

is to some extent linked to one's ability to acquire information from his or her external environment where that information is then communicated to another.

But such "passive" information-gathering activities, which people engage in as a mostly unconscious and natural everyday activity, are not likely to be the subject of a claim of First Amendment entitlement. This is true for the simple reason that most people are unlikely to ever encounter any governmental interference with such normal and expected human activities.[40] Such interference is most likely to be encountered when information gathering shifts from a passive mode into a more active one, and not even then until people are engaged in seeking out information in a manner that conflicts with other socially-valued interests that have a claim to legal recognition. It is at this point, when a person's information-seeking activities are at greatest risk of "invad[ing] the rights and liberties of others,"[41] where one's alleged First Amendment interests may clash with other legally recognized interests such as rights in property, privacy, confidentiality, or security.

Thus it is apparent that claims of a First Amendment right to gather information are most likely to arise in situations where someone's information-seeking activities are being met with objections of others—often the government itself—asserting conflicting, legally cognizable interests. To date, news and information-gathering claims made by the news media and public have taken on a "sword" and "shield" aspect: as a sword to gain access to government proceedings and facilities, as well as to obtain other information or documents within the government's control; as a shield mainly when asserted as a defense by members of the news media who have been accused of violating civil or criminal laws in the course of gathering the news, or who have been subjected to civil or criminal process by government officials or private parties attempting to obtain information gathered in the course of a news investigation.[42]

But as scientific and technological advances facilitate the ability to both gather and disseminate information, increasing the demand for and uses of information, it is not difficult to envision a proliferation of information-gathering

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[40] It may be true for another reason as well: generally the Court has extended First Amendment protection to conduct only when it is engaged in for a "speech" purpose. *See supra* note 30 and accompanying text. Thus to the extent a person was not gathering information with a conscious purpose of using it in a subsequent communication, any claim of First Amendment protection for that conduct might be viewed as being too attenuated to assert. Indeed, I will argue later that First Amendment protection for information-gathering activities should be predicated, among other things, upon an intent to publicly disseminate the sought-after information. *See infra* notes 330–33 and accompanying text.

[41] Branzburg v. Hayes, 408 U.S. 665, 683 (1972) (observing that the press "has no special privilege to invade the rights and liberties of others" in performing its functions) (citing Associated Press v. NLRB, 301 U.S. 103, 132–33 (1937)).

[42] *See infra* notes 213–22 and accompanying text.

claims both inside and outside these traditional spheres of contest. The development of increasingly smaller and easy-to-use videotaping, photographing, and recording equipment has produced a plethora of claims in recent years of a First Amendment right to record government proceedings, police conduct, public events, and scenes of accidents and disasters.[43] Owners of information products distributed in digital form, either on-line or in other electronic media like CD-ROMs, were recently successful in convincing Congress to supplement traditional copyright protections for such products with additional laws essentially banning the sale, distribution, and use of software that can be used to override access control and anti-copying mechanisms embedded in such information products.[44] Already claims are being made that these laws conflict with the First Amendment rights of others to gain access to and copy digital works when it would be arguably lawful to do so in the absence of such control mechanisms.[45]

As biomedical science exerts increasing control over biological processes, more calls are being made to regulate or prohibit certain areas of scientific

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[43] *See, e.g.*, Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding that citizens have a First Amendment right to videotape the conduct of police officers in public places); Whiteland Woods, L.P. v. Township of W. Whiteland, 193 F.3d 177, 183–84 (3d Cir. 1999) (holding that a ban on videotaping township planning committee meetings was a reasonable time, place, and manner restriction on First Amendment right of access to such proceedings); *see also* cases discussed at *supra* notes 15–16 and accompanying text.

[44] *See, e.g.*, United States v. Elcom, Ltd., 203 F. Supp. 2d 1111, 1123–25 (N.D. Cal. 2002) (describing anti-circumvention and anti-trafficking provisions of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C.A. § 1201(b) (West Supp. 2003)).

[45] *See id.* at 1132–35 (rejecting the First Amendment overbreadth claim of a maker of software permitting the copying of electronic books that DMCA "impairs the First Amendment right to access non-copyrighted works [and] . . . precludes third parties from exercising their rights of fair use," all in derogation of society's interest in "the free flow of such information"); *see also* Edelman v. N2H2, Inc., 263 F. Supp. 2d 137, 138–39 (D. Mass. 2003) (dismissing as premature a declaratory judgment action by a computer researcher alleging, *inter alia,* that DMCA violated his First Amendment right to gain access to and copy a list of websites blocked by Internet filtering software for purposes of testing and publishing a study on the software's accuracy). It should be noted that when a First Amendment defense is made to charges of illegally *accessing* and *copying* digital works, as opposed to illegally *disseminating* them, what is really being asserted is a First Amendment right to access or gather the pertinent materials (versus the traditional right of expression which would be implicated by charges of the latter sort). This distinction would be particularly evident in cases where a protected work was accessed and copied illegally with an intent to disseminate it, but for whatever reason was never subsequently disseminated. Of course, if there was never an intent or purpose to disseminate or "speak" a copied work, it is difficult to see how a First Amendment defense would be implicated at all. For a discussion of the Supreme Court's treatment of claims that a First Amendment right to gather information is being impaired by the application of generally applicable laws (such as the DMCA or copyright laws), see *infra* notes 284–302 and accompanying text.

research. Indeed, in 2003 the House of Representatives voted to ban a type of scientific procedure that would effectively preclude further experimentation in a new field of medical research, thus precluding the acquisition of new information and data that would allow that research to advance.[46] And with the recent

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[46] An uncontroversial part of the House's bill makes it a criminal act to attempt to clone a human being, but more controversial provisions also criminalize a procedure called "therapeutic cloning," which scientists use to create human embryos for purposes of stem cell research. *See* Aaron Zitner, *House Votes to Outlaw Human Cloning; Ban Includes Research*, L.A. TIMES, Feb. 28, 2003, at A32 (discussing the Human Cloning Prohibition Act of 2003, H.R. 538, 108th Cong. (2003)). The House had passed a similar bill in the previous session of Congress, but it died in the U.S. Senate "after a bitter stalemate in which scientists and patient advocacy groups argued that a [total] ban [on cloning] would stall promising medical advances." Rick Weiss, *An Uncertain Year for Cloning Laws; Ban on Embryo Research Seen as Unlikely*, WASH. POST, Dec. 26, 2002, at A1. Despite the House's passage of the bill for a second time, many believe that a political compromise will be reached resulting in a mandatory moratorium on therapeutic cloning research for a set period of time (which essentially would be a ban on research for that period). *See id.* Any consideration of the profound ethical and moral issues associated with cloning human embryos for research purposes is beyond the scope of this Article. The point here is that scientific research, as a form of information gathering, is going to be subject to increasing public scrutiny and calls for regulation as it pushes forward the frontiers of knowledge and human capabilities in various fields. *See, e.g.*, Justin Gillis, *Scientists Planning to Make New Form of Life*, WASH. POST, Nov. 21, 2002, at A1 (reporting that "[s]cientists . . . plan to create a new form of life in a laboratory dish, a project that raises ethical and safety issues but also promises to illuminate the fundamental mechanics of living organisms"). Undoubtedly, such calls will be answered by claims of scientists that they have a First Amendment right to engage in such research. *See California Attempts Stem Cell Research*, ASSOCIATED PRESS, Mar. 11, 2002 (quoting state legislator supportive of stem cell research as stating, with respect to potential federal laws restricting it, that " '[t]here are a whole spectrum of legal issues that should be considered' . . . including scientists' First Amendment rights to freedom of expression in the research"). Indeed, similar calls to restrict scientific research were made in the 1970's after Stanford University scientists learned to recombine the DNA of different microorganisms, spurring fears of an inadvertent release of potentially dangerous life forms into the environment. In response to these calls, several legal scholars argued both for and against a First Amendment right to engage in scientific research. *Compare* Gary L. Francione, *Experimentation and the Marketplace Theory of the First Amendment*, 136 U. PA. L. REV. 417, 422–26 (1987) (rejecting First Amendment right to engage in scientific experimentation), *with* John A. Robertson, *The Scientist's Right to Research: A Constitutional Analysis*, 51 S. CAL. L. REV. 1203, 1215–40 (1977) (advocating such a right).

One might argue that scientific research is a qualitatively different information-gathering activity for First Amendment purposes than, say, typical newsgathering or investigative journalism. For instance, scientific research often involves "academic freedom" considerations that are normally not thought to be present in journalism and which may raise special First Amendment concerns. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 262–63 (1957) (Frankfurter, J., concurring). On the other hand, with science being increasingly funded by profit-oriented private businesses that often

proliferation of non-governmental organizations such as non-profit research institutes (otherwise known as "think tanks") and other public interest or issue advocacy groups that are seeking to hold government and industry more accountable, more and more studies and investigations are being undertaken that can be expected to raise additional claims of entitlement to information.[47]

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keep their discoveries confidential for competitive reasons, one might question to what extent academic freedom principles are still applicable to such scientific enterprises (not to mention the fact that if scientific discoveries are kept confidential rather than being published in conformity with traditional norms, one might question the extent to which the First Amendment's protection for "free speech," or more accurately "information gathering for speech purposes," is even implicated). In addition to these problems, one could argue that scientific research often involves the "generation" of new information, whereas typical journalism only involves the "collection" of existing information. *See, e.g.*, Roy G. Spece, Jr. & Jennifer Weinzierl, *First Amendment Protection of Experimentation: A Critical Review and Tentative Synthesis/Reconstruction of the Literature*, 8 S. CAL. INTERDISC. L.J. 185, 188 (1998). Needless to say, any extended consideration of the differences between scientific research and other types of information-gathering activities is beyond the scope of this Article. Suffice it to say for present purposes, however, that to the extent the scientific community premises a constitutional right to engage in scientific research on the First Amendment's protection for free "speech" or "press," it would seem that the more such research is linked to expressive activities or purposes, the stronger the First Amendment claim would be. In this sense, then, the scope of the First Amendment's protection for speech-related information-gathering activities would seem to be highly relevant to the question of a right to engage in scientific research under the First Amendment. If a requirement of speech or publication were divorced from such claims, scientists would then essentially be claiming a "right to know" under the First Amendment. I argue elsewhere in this Article that implying a freestanding "right to know" under the First Amendment (i.e., one divorced from an identifiable speech or publication purpose for engaging in the conduct for which constitutional protection is claimed), would be inappropriate from both a legal and policy perspective. *See infra* notes 266–73 and accompanying text.

[47] *See, e.g.*, National Institute for Research Advancement, World Directory of Think Tanks viii (4th ed., 2002) (observing that "[t]hink tanks . . . have been proliferating all over the globe"); *see also, e.g.*, Douglas Farah, *Report Decries Saudi Laxity: U.S. Must Act to Dry Up Al Qaeda Funds, Policy Group Says*, WASH. POST, Oct. 17, 2002, at A18 (describing a study by the Council on Foreign Relations critical of Bush Administration for failing to "crack down" on Saudi Arabia's alleged financing of terrorist groups); Milt Freudenheim, *Report Rates Hospitals in State on Care in Life-Threatening Illnesses*, N.Y. TIMES, Nov. 25, 2002, at B5 (describing a report by the Alliance for Quality Health Care identifying hospitals in New York "where relatively high numbers of patients die during treatment for life-threatening conditions"); Neely Tucker, *White House Told to Turn Over More Data on Energy Panel*, WASH. POST, Aug. 3, 2002, at A6 (describing a lawsuit by certain public policy groups—the Sierra Club and Judicial Watch—to obtain a list of participants and contacts involved in an energy policy task force chaired by Vice President Cheney); Editorial, *The Curse of Factory Farms*, N.Y. TIMES, Aug. 30, 2002, at A18 (editorial based on Sierra Club report describing pattern of environmental violations by farms run by large agricultural corporations). Indeed, in a 1975 speech Justice Stewart asserted that freedom of the press was specifically protected by the First Amendment in

All of these situations are rife with potential conflicts between claims of a right to gather information and countervailing legally-recognized interests. But given that similar conflicts also arise with respect to engaging in speech or receiving communications (which, like many legal rights, are normally not even asserted unless such a conflict has arisen), what is it about a right to gather information that makes courts hesitate to accord it a similar level of First Amendment protection? The answer to this question begins in the language of the First Amendment itself. As noted earlier, the literal protections of the Amendment are limited to the freedom to speak and publish. Although expanded through subsequent Court interpretations to meet evolving social conditions, these freedoms remain at the core of First Amendment protection. And there was, and remains today, good reason to keep First Amendment rights at least centered on these particular activities.

Whenever one is granted a "right" or "freedom" to engage in certain conduct, other members of society incur a corresponding obligation to tolerate that conduct. In other words, to borrow from an adage, one person's freedoms are another person's chains. And in a society that is committed to managing the inevitable tensions between the ideals of "liberty" and "justice," it is incumbent upon the law to order human conduct in a way that achieves an optimal balance between the enjoyment of guaranteed freedoms by those exercising them, and the infringement on the same or other freedoms enjoyed by others. In other words, individual freedoms or rights are by necessity never absolute: they are limited to the extent necessary to achieve the maximum enjoyment of all individual rights, as well as the collective interests of society as a whole.

And so it is with freedom of expression. To the extent that freedom entitles one to communicate information and ideas either orally or through published writings, the danger of infringement on the rights and liberties of others is relatively constrained. Certainly the expression of one's views or beliefs may be extremely offensive or annoying to others, but that is a price we are willing to pay to reap the benefits of a free flow of information and ideas. Therefore, society has generally not recognized a right or liberty to be free from receiving speech that otherwise enjoys First Amendment protection.[48] But as freedom of expression

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order to protect the press' role as an independent, expert check on government. *See* Stewart, *supra* note 28, at 634. Today it might be persuasively argued that private research and policy organizations perform this role to an even greater extent than the institutional press, with respect to both public and private centers of power. *Compare* Martin H. Redish, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 261–64 (1998) (arguing that private corporations also provide an additional and valuable check on the government, and, at times, even the institutional press).

[48] *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–11 (1975) (The Court asserted that "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the

moves away from such "pure speech" activities, and expression is delivered or facilitated through forms of conduct beyond the basic acts of speaking or publishing, the potential for interference with other socially-valued rights and liberties increases. No longer is that interference limited to reluctant reception or listening, but now a wider panoply of potential conflict is opened for a very natural reason: when a person acts on her physical environment in a more intrusive manner, she increases the potential for more "equal and opposite reactions" to occur within that environment (to borrow a concept from Sir Isaac Newton). In other words, by acting in a more physical manner, chances increase that such actions will impinge upon important freedoms of others.[49]

For instance, if a person desires to express a political message that is offensive to others solely through the vehicle of speech or writings, another person may be forced to hear or see some things that she would otherwise have chosen to avoid. But if that same person burns a draft card or flag to deliver his message, now he has acted upon his environment in a more intrusive manner. Not only may another person be forced to see something that she would have avoided otherwise, but the speaker has also destroyed a document the government created to administer the draft system (in the case of draft cards), or has perhaps created a threat to the safety of surrounding people and property by starting a fire. To take account of such increased impingements on the rights of others presented by the use of "expressive conduct" as a vehicle of communication, the Court developed the "speech-action" dichotomy in First Amendment law. Under that doctrine, the government is given greater leeway to regulate expressive or symbolic conduct provided such regulation aims to achieve legitimate control over the effects of the non-expressive components of the conduct, and is unrelated to the suppression of the expression itself.[50]

Similar considerations apply when the government is attempting to regulate non-expressive conduct that facilitates acts of expression, rather than when the conduct is being engaged in for its inherently symbolic effect. Thus the Court has said that when government is regulating conduct bound up with speech as a "time, place or manner" restriction on how that speech is communicated, the

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unwilling listener or viewer. Rather, . . . the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.") (internal citations and quotations omitted). The Court has, however, recognized that there are certain "captive audience" type situations, such as the home, where it is more difficult for a listener to avoid undesired speech, thus endowing the listener with greater interests in not being subjected to it. *See* SMOLLA, *supra* note 29, at 5-5.

[49] *See, e.g.*, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 9 (1970) (asserting that "expression is normally conceived as doing less injury to other social goals than action" and that "[i]t generally has less immediate consequences, is less irremediable in its impact"). Of course, certain types of speech can be inherently harmful—such as obscenity, libel or incitement—which is one reason these particular categories of speech receive little or no First Amendment protection.

[50] *See supra* note 34.

government is generally given greater latitude to regulate that conduct with similar provisos that the regulation is not being used as a pretext to restrict the expression itself.[51] But when non-expressive conduct is *not* bound up with the *act of expression itself*, as in the case of gathering news or information that one expects will form the basis for a subsequent communication, the link between expressive and non-expressive conduct becomes even more attenuated. Hence it is not surprising that the First Amendment might be even less protective of such activities,[52] especially when one examines the nature of information-gathering activities in greater detail.

Information gathering frequently consists of predominantly non-expressive conduct that is unable to lay claim to the core First Amendment protection accorded to expression itself. As mentioned earlier, many news and information-

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[51] *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 790–803 (1989). Sometimes, however, non-expressive conduct is so intimately bound up with the delivery of speech that the Court declines to treat the regulation of that conduct as a mere "time, place and manner" restriction subject to an "intermediate" standard of review. *See* Watchtower Bible and Tract Soc'y of New York, Inc. v. Vill. of Stratton, 536 U.S. 150, 164–69 (2002) (appearing to strike down a licensing requirement on door-to-door solicitations under a more stringent standard of review than the intermediate scrutiny test normally applied to "time, place or manner" restrictions).

[52] Justice Brennan recognized this distinction between expressive activity and non-expressive conduct engaged in for the purpose of facilitating expression. In a public address he argued that the First Amendment protects two models of the press: the "speech" model which is accorded absolute protection, and the "structural" model which protects the communicative *functions* of the press such as newsgathering where "the press' interests may conflict with other societal interests and adjustment of the conflict on occasion favors the competing claim." William J. Brennan, Jr., *Rutgers Address*, 32 RUTGERS L. REV. 173, 176–77 (1979). Thus in Justice Brennan's view, while newsgathering is entitled to First Amendment protection, it is at a lower level than expression itself and requires more of a general balancing of the First Amendment and competing societal interests. *See id.* Other commentators have also recognized the distinction between expressive activities and non-expressive conduct that facilitates subsequent speech, and the lower level of First Amendment protection that is generally appropriate for the latter type of conduct absent a governmental purpose to indirectly regulate the speech itself. *See, e.g.*, Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 724 (1991) (describing a "continuum" of speech-facilitative acts running from those that are part of the speech activity itself, to "separate activities . . . specifically designed to facilitate speech, to general activities . . . that may facilitate many behaviors—including speech"); *see also id.* (asserting that "at some point the connection to speech becomes so attenuated that [First Amendment] protection must disappear" such as for general facilitative behaviors burdened by "general regulatory schemes"). Speech-related information gathering activities would plainly qualify as "separate activities specifically designed to facilitate speech" under Professor Williams' scheme, presumably warranting some First Amendment protection but perhaps not as much as the facilitative aspects of communicative activities themselves.

gathering claims concern a right of access to government proceedings or facilities in order to observe and listen to what is happening inside, or to government documents in order to read their contents. As to gaining physical access to such locations or documents, there is nothing inherently expressive about the act of being in or traveling to one place versus another, or in the act of obtaining documents or other materials. The same is generally true for the acts of observing, listening, reading, and learning that would accompany such access.[53] Now if a journalist, for example, were to ask questions or interview people in connection with such access, or take notes of her findings or other observations, it is likely that one would consider her to be engaged in expressive activity. However, such expressions or communications would normally be wholly incidental to the information-gathering process itself, and it is difficult to see how a desire to engage in such expression could justify a right of access to the information in the first place.[54] In other words, any protection for such incidental expression would normally be a wholly inadequate basis for protecting the entire information-gathering process itself (and thus for obtaining the desired information).

These observations about the gathering process vis-a-vis government-controlled information apply generally to most other information-gathering activities engaged in for a speech-related purpose. Whether a journalist is investigating a story, or a scholar or scientist is conducting research for a study, she will initially need to gain access to information in order to gather it. And once access is achieved, such gathering will consist of much non-expressive behavior

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[53] *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) (plurality opinion) (describing right of access to criminal trials as a "right to attend [such] trials to hear, see, and communicate observations concerning them"). Of course, the "communication" part of this process would follow access and implicate a basic right of free speech.

[54] *See, e.g.*, Phillips v. Bureau of Prisons, 591 F.2d 966, 974–76 (D.C. Cir. 1979) (holding that neither a paralegal nor prisoners had a First Amendment right to have the paralegal enter a prison in order to conduct legal interviews with prisoners); *id.* at 975 (observing that "[a]n act does not necessarily take on characteristics invoking the First Amendment simply because if taken it may usher in another episode plainly possessing First Amendment elements"). I will argue, however, that in certain circumstances a speech-related information-gathering purpose for seeking access to government information *can* justify an access right even where an intent to engage in expression incidental to that purpose cannot. This is justified by the societal purpose of the speech to be engaged in as a result of such information gathering, which serves much stronger First Amendment interests than incidental expressive activities that might be engaged in as part of such information-gathering activities. *See infra* Part IV. Of course, as mentioned earlier, the Court has recognized a First Amendment right of access to *public* places for the purpose of engaging in speech. *See supra* note 37 and accompanying text. But since claims of access to government information will ordinarily be limited to *non-public* places or information (if places or information are accessible by the public there typically would be no need to assert a right of access), this speech-related right of access would be of little use to one engaged in information gathering.

such as listening, observing, reading, or other ways people naturally obtain information from their surroundings. But it will also be done increasingly through the assistance of electronic devices such as cameras, video recorders, or computers, the use of which would also be difficult to describe as "expressive activity" when they are being used to simply record, store, and process information for dissemination at a later point.[55] And as I just discussed, while some incidental expression will often attend the information-gathering process, rarely would it be a sufficient component to justify First Amendment protection for the entire process itself.[56]

But the fact that information gathering generally consists of non-expressive activity cannot be totally dispositive of the First Amendment question for, as explained earlier, many forms of non-expressive conduct receive such protection given a sufficient link to expressive activity. For instance, the right to receive information and ideas is a fully recognized First Amendment right[57] even though,

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[55] However, as frequently occurs in a copyright context, an operator of a camera, video-recorder, or television camera might argue that he or she has engaged in creative expression by making "artistic" decisions in connection with the use of such devices. *See, e.g.*, Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 668–69 (7th Cir. 1986) (holding that telecast of a baseball game contained sufficient creative expression to be copyrightable because of "[t]he many decisions that must be made during the broadcast of a baseball game concerning camera angles, types of shots, the use of instant replays and split screens, and shot selection"). But even if such information-gathering techniques could be said to be expressive in nature for this reason, it would be unlikely that such incidental expression would provide sufficient First Amendment grounds for protecting the entire information-gathering process itself (including overcoming any governmental interference with initial access to the information). *See supra* notes 53–54 and accompanying text; *see also infra* note 56. On the other hand, whether one is engaged in "non-incidental expression" that might provide sufficient First Amendment interests to justify a right of access to information when operating equipment such as a television camera that *simultaneously* records and broadcasts the information being gathered to the public, is a more interesting question. *Cf.* American Broadcasting Cos. v. Cuomo, 570 F.2d 1080, 1083 (2d Cir. 1977) (holding that a television network had a First Amendment right to enter private property and broadcast post-election activities when other networks had been granted access). At least with respect to government-controlled information, however, the Supreme Court has held that the First Amendment does not provide a right to gather information in a "more effective" manner (i.e., via electronic media or devices) if basic physical access to information has been provided. *See infra* note 80. In this sense, then, any governmental restrictions on the use of electronic devices to gather information could be viewed as permissible "time, place or manner" restrictions on a basic right to gather information for First Amendment purposes. It is such a basic right to gather information that is the primary concern of this Article. *See id.*

[56] *See, e.g.*, Easton, *supra* note 25, at 1141 ("Notwithstanding its importance to First Amendment values . . . newsgathering is still merely conduct, not speech.").

[57] *See supra* note 35 and accompanying text; *see also* Conant v. Walters, 309 F.3d 629, 643 (9th Cir. 2002) (Kozinski, J., concurring) ("It is well established that the right to

like the information-gathering process, it is difficult to characterize acts of listening, observing, or reading as being expressive in and of themselves. Moreover, like a right to gather information, a right to receive information and ideas is typically asserted simply to gain access to sources of information.[58]

So what is it about the right to receive information that makes the law more willing to accord it First Amendment protection? Probably the main difference is that the right to receive information and ideas generally "presupposes a willing speaker."[59] That is, the right to receive information is directly linked to the speech of another,[60] as well as the speaker's intent to communicate to an audience comprising the listener (be it the whole world, as with a book author, or a more select group of listeners).[61] By contrast, information gathering merely precedes and anticipates speech that may or may not arise from such activities. Moreover, the right to gather information often will involve attempts to acquire information from "unwilling" speakers like the government in certain cases or situations that may involve no "speakers" at all (as with journalist access to events or places, scientific research on non-human or inanimate objects, or even sought-after interviews of human information sources where no "willing speaker" exists per se until the investigator initiates a conversation and begins to elicit the desired "speech").[62] Because of this, although a right to receive information may overlap

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hear—the right to receive information—is no less protected by the First Amendment than the right to speak. . . . Indeed, the right to hear and the right to speak are flip sides of the same coin." (citations omitted)).

[58] *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972) (rejecting a claimed violation of a university community's right to receive speech where the government refused to grant a foreign speaker a visa to enter the U.S. on the basis of the government's plenary authority to control the country's borders).

[59] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Counsel, Inc., 425 U.S. 748, 756 (1976).

[60] As Justice Brennan observed with respect to the right to receive information and ideas, "the right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

[61] For instance, the right to receive information would certainly not protect eavesdropping activities, whereas the right to gather information has been invoked (albeit unsuccessfully) to protect such activities in the newsgathering context. *See, e.g.*, Dickerson v. Raphael, 564 N.W.2d 85, 92 (Mich. Ct. App. 1997), *rev'd on other grounds*, 601 N.W.2d 108 (Mich. 1999) (rejecting a First Amendment newsgathering defense regarding the violation of eavesdropping statutes in connection with an investigation of the Church of Scientology).

[62] Quite surprisingly, lower courts will often confuse the right to receive information with the right to gather information, even in situations where there clearly is no "willing speaker" present. *See, e.g.*, Bonnichsen v. Dep't of the Army, 969 F. Supp. 628, 645–48 (D. Or. 1997) (treating scientists' assertion of a First Amendment right to study and test

with a right to gather it in some situations, the latter right encompasses a much larger range of information-seeking activities.[63]

This wider sweep of an information-gathering right, and especially its application to situations involving unwilling speakers, creates the potential for greater conflict with important rights or interests of others.[64] Whether one wants to gain access to a government proceeding or facility that has been closed to the public, obtain copies of sensitive government documents, conduct investigations or research likely to arouse the opposition of others, or gain access to digital information that has been access or copy-protected, it is clear that such activities may conflict with the legally recognized interests of others that society values as much if not greater than the potential expression facilitated by such activities (e.g., interests in security, confidentiality, privacy, or property). And such opposing rights and interests create formidable opponents for an information-gathering right. These are not contests that courts are likely to encourage.

In addition, unlike a right to receive information, the right to gather information is not considered to be an essential part of the process of speech.[65] While the acquisition of particular information on a subject might enhance the *substance* or *quality* of communications about it, one would typically remain free to communicate about that subject, albeit without the benefit of such information. Thus, one could pursue alternative avenues for learning about a subject, or simply make educated guesses, render opinions, or engage in speculation about it. Such expressions just might not be as factual, objective, or reliable as they otherwise could have been had certain information been obtained by the speaker. But given the First Amendment's concern with ensuring a "free and full flow of information" to facilitate *informed* self-governance (not to mention the Amendment's truth-seeking purpose),[66] this seems to be a particularly poor

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the remains of an ancient human skeleton as a right to "*receive* information") (emphasis supplied).

[63] Indeed, the right to receive information might be thought of as a subset of a right to gather information but for another important difference where the former right might be implicated in situations where the latter right would not. The right to receive would apply to situations where a hearer or reader had no intent to "retransmit" the information that was received. By definition, a right to gather information should only apply to situations where a person gathers information with a First Amendment purpose for doing so (i.e., to communicate the gathered information as part of another information flow). *See infra* notes 330–33 and accompanying text.

[64] *Cf.* Emerson, *supra* note 26, at 6 (arguing for absolute protection of a right to receive information and ideas in part because "any danger to the social order [from such a right] is so inchoate and so unascertainable that it cannot be given substance or taken into account").

[65] *See id.* (observing that "[t]he right to read, listen, or see is so elemental, so close to the source of all freedom, that one can hardly conceive of a system of free expression that does not extend it full protection").

[66] *See supra* note 30.

rationale for failing to accord information gathering an adequate measure of constitutional protection.

In sum, it is evident that a right to gather information lies at the periphery of traditional First Amendment protection for expressive activities, and presents difficulties that are not implicated to the same degree by according protection to the opposite end of information flows—i.e., to the receipt of information and ideas.[67] At the same time, information gathering clearly implicates First Amendment interests given its capacity for supplying and enhancing the quality of those flows, and according constitutional protection to such activities would be consistent with the Court's traditionally expansive reading of First Amendment rights. Before considering the circumstances under which information-gathering conduct ought to be brought under the First Amendment umbrella,[68] it is necessary to examine the evolution and current status of this "right" in the Court's freedom of expression jurisprudence. As this examination will demonstrate, many of the aforementioned considerations of the role and nature of an information-gathering right have played a significant part in the thought processes of different Justices as they struggled with these issues.

II. EVOLUTION OF SUPREME COURT JURISPRUDENCE DEALING WITH A RIGHT TO GATHER INFORMATION

A. *The Relevant Supreme Court Decisions*

The evolution of the Court's cases dealing with an asserted right to gather information reflects the difficulties presented by such a right, particularly given its "implied" or "unenumerated" nature. Significant developments in this evolution occurred in eight important cases, which are examined below in detail.

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[67] Because of these differences between a right to receive information and a right to gather it, I disagree with the approach of Professor Emerson, who argued for the treatment of both of these rights as components of an overall First Amendment "right to know." *See* Emerson, *supra* note 26, at 2–5. For the reasons just discussed, there is good reason to accord the right to receive information First Amendment protection on par with the right to communicate, while according such protection to information-gathering activities on the more limited basis I suggest in Part IV. Obviously, if both of these rights are treated as subsets of one overarching First Amendment right, conceptually and juridically it makes it much more difficult to make these kinds of distinctions. Moreover, as I argue in Part III, the basic concept of a "right to know" in First Amendment jurisprudence seems inappropriate for several reasons, not the least of which is that such a right bears little resemblance to the "right of speech and press" which the First Amendment literally protects. *See infra* notes 266–73 and accompanying text.

[68] *Cf.* Brennan, *supra* note 52, at 177 (noting that granting First Amendment protection for newsgathering "significantly extends the umbrella of the press' constitutional protections").

1. Zemel v. Rusk: *No "Unrestrained" Right to Gather Information Under the First Amendment*

Most of the Court's "information-gathering" cases to date have involved claims of a right to gather news asserted by the institutional press. However, somewhat ironically, the Court's first important decision in this area was the only one to directly address an asserted right to gather information by non-media parties.[69] In *Zemel v. Rusk*,[70] after the U.S. State Department restricted travel to Cuba in the early 1960s, Louis Zemel requested permission to travel there as a tourist to "satisfy [his] curiosity about the state of affairs in Cuba and to make [him] a better informed citizen."[71] Among a host of other claims, Zemel argued that the restrictions directly interfered with "the First Amendment rights of citizens to travel abroad so that they might acquaint themselves at first hand with the effects abroad of our Government's policies, foreign and domestic, and with conditions abroad which might affect such policies."[72]

The Court agreed with Zemel that the travel restrictions "render[ed] less than wholly free the flow of information concerning [Cuba]," and also that this was a factor to consider in evaluating Zemel's claim that the government had violated his Fifth Amendment right to travel.[73] However, the Court could not "accept the contention of [Zemel] that it is a First Amendment right which is involved. For to

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[69] Although the Court recently decided one other case involving an asserted right to gather information outside of the newsgathering context, *see Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999), the case was decided on other grounds, and the information-gathering claim was not presented directly for decision. *See infra* notes 193–209 and accompanying text. Although a claim for access to government information was asserted by both press and non-press parties in *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), the non-press parties relied on the press' right of access for newsgathering purposes to "press" their claims. *See infra* notes 117–19 and accompanying text.

[70] 381 U.S. 1 (1965).

[71] *Id.* at 4.

[72] *Id.* at 16.

[73] *Id.* In an earlier portion of the opinion, the Court had rejected Zemel's Fifth Amendment claim that the government had improperly restricted his liberty interests in traveling without due process of law. The Court held:

> [T]he Secretary has justifiably concluded that travel to Cuba by American citizens might involve the Nation in dangerous international incidents, and that the Constitution does not require him to validate passports for such travel.
>
> . . . That the restriction . . . in this case is supported by the weightiest considerations of national security is perhaps best pointed up by recalling that the Cuban missile crisis of October 1962 preceded the filing of appellant's complaint by less than two months.

Id. at 15–16.

the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition . . . it is an inhibition of action."[74] Further, the Court explained:

> There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.[75]

Thus the Court declined to find that the freedom to speak and publish includes an "unrestrained" right to gather information.[76] In the Court's view, to hold otherwise would open up a virtual floodgate of challenges to government regulation on the grounds that an argument could almost always be made that an

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[74] *Id.* at 16.

[75] *Id.* at 16–17.

[76] In a dissent eerily reminiscent of calls heard today regarding the need for Western and Eastern societies to understand each other better, Justice Douglas, joined by Justice Goldberg, argued:

> The right to know, to converse with others, to consult with them, to observe social, physical, political and other phenomena abroad as well as at home gives meaning and substance to freedom of expression and freedom of the press. Without those contacts First Amendment rights suffer. . . .
>
> The ability to understand this pluralistic world, filled with clashing ideologies, is a prerequisite of citizenship if we and the other peoples of the world are to avoid the nuclear holocaust. . . .
>
> . . . .
>
> . . . [T]he only so-called danger present here is the Communist regime in Cuba. . . . They are part of the world spectrum; and if we are to know them and understand them, we must mingle with them . . . . Keeping alive intellectual intercourse between opposing groups has always been important and perhaps was never more important than now.

Zemel v. Rusk, 381 U.S. 1, 24–25 (1965) (Douglas, J., dissenting). Moreover:

> [T]he right to travel is at the periphery of the First Amendment, rather than at its core, largely because travel is, of course, more than speech: it is speech brigaded with conduct. "Conduct remains subject to regulation for the protection of society. . . . [But i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." Restrictions on the right to travel in times of peace should be so particularized that a First Amendment right is not precluded unless some clear countervailing national interest stands in the way of its assertion.

Id. at 26 (internal citations omitted).

inability to engage in conduct has a detrimental impact on the acquisition of information related to that conduct.

But since few, if any, constitutional rights are "unrestrained" in the sense of being unqualified or absolute, was the Court suggesting by implication that some sort of First Amendment right to gather information did exist? Certainly the Court did not agree with Justice Douglas' suggestion in his dissenting opinion that such a right was a "fundamental personal libert[y]."[77] However, some Justices dissenting in subsequent cases argued that "[t]he necessary implication [of the Court's use of the "unrestrained" term was] that some right to gather information does exist."[78]

2. Branzburg v. Hayes: *A Newsgathering Right of Constitutional Dimensions*

In *Branzburg v. Hayes*[79] the Court displayed more receptivity to a right to gather information by the organized press—at least to the extent of acknowledging the logic of according such activities some constitutional protection in order to safeguard the "freedom of the press." In that case, various newspaper and television reporters had been subpoenaed to testify before a grand jury with respect to information they had obtained while covering stories about allegedly criminal activities (including the identity of confidential informants). The journalists argued that compelling them to testify would unduly burden their right to gather news by deterring their sources from providing information—"all to the detriment of the free flow of information protected by the First Amendment."[80] Hence, the journalists argued, the Court should recognize a

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[77] *Id.* at 26 n.* (Douglas, J., dissenting); *see also supra* note 76.

[78] Branzburg v. Hayes, 408 U.S. 665, 728 n.4 (1972) (Stewart, J., dissenting); *see also* Houchins v. KQED, Inc., 438 U.S. 1, 28 n.15 (1978) (Stevens, J., dissenting).

[79] 408 U.S. 665 (1972).

[80] *Id.* at 680. While *Branzburg* appears to be the first case decided by the Court involving a claim of undue government interference with the press' right to gain *access* to news sources, one month after *Zemel* had been decided the Court did address the right of the press to gather news to which they otherwise had access *in a particular way*. *See* Estes v. State of Texas, 381 U.S. 532, 535–36 (1965). In *Estes*, five Justices rejected the argument that the broadcast news media had a First Amendment right to televise courtroom proceedings that were otherwise open to the public and press. *See id.* at 539–40 (plurality opinion); *id.* at 589 (Harlan, J., concurring). In dealing with a First Amendment right to gather information, this Article will focus on a *basic* right to access and gather information *in any manner*, as opposed to a right to use a *particular* medium or technology for gathering it once access has been achieved. This is not to say, however, that government interference with "more effective" mediums for gathering information does not raise First Amendment concerns. *See, e.g.*, *Houchins*, 438 U.S. at 16–17 (Stewart, J., concurring in the judgment) (arguing that once the government has permitted access to certain information, the press has a First Amendment right to "effective" access

limited privilege grounded in the First Amendment that would excuse journalists from providing such testimony unless the government could establish a compelling need for the information.[81]

In a lengthy 5-4 decision, the Court declined to create a special privilege for journalists in the context of grand jury investigations, but did clearly assert that newsgathering activities were entitled to "some" First Amendment protection.[82] At the inception of its analysis, the Court pointedly observed it was not "suggest[ing] that news gathering [did] not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."[83] But after explaining that the press was subject to general laws like everyone else, the Court concluded that the press was not entitled to the "privileged position"[84] it appeared to be claiming:

> On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.[85]

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in terms of the use of video and audio recording equipment); *see also infra* note 129 and accompanying text. But interference with "more effective access" to information does not impede the flow of information to the public to the same degree as interference with access itself, since in the former situation the public is presumably still receiving some of the desired information, albeit perhaps not in the most preferable form (e.g., reading a journalist's account of courtroom proceedings versus viewing the actual proceedings for oneself via a television broadcast). Further consideration of the constitutionality of restrictions on particular methods of gathering information is beyond the scope of this Article. For commentary on a First Amendment right to gather information in a particular manner, see, for example, Diane L. Zimmerman, *Overcoming Future Shock:* Estes *Revisited, or a Modest Proposal for the Constitutional Protection of the News-Gathering Process*, 1980 DUKE L.J. 641 (1980).

[81] *See Branzburg*, 408 U.S. at 680.

[82] *Id.* at 681.

[83] *Id.*

[84] *Id.* at 682.

[85] Branzburg v. Hayes, 408 U.S. 665, 690–91 (1972). Because the press had no right to violate criminal laws or invade the rights of other citizens in gathering the news, the Court concluded that compelling reporters to testify about criminal acts witnessed by them presented "no substantial question." *Id.* at 692. The more difficult question, in its view, was requiring reporters to divulge the identity of informants who had not engaged in any wrongdoing themselves. But after an exhaustive analysis considering a number of factors—such as the lack of evidence that the flow of news would be significantly constricted by failing to create a privilege, the need for effective enforcement of criminal laws, the fact that the press historically had "flourished" without a testimonial privilege, the government's "compelling" interest in preventing crime, and the absence of judicial

Yet the Court ended its analysis by once again asserting that "news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment."[86]

In providing the critical fifth vote to decide the case, Justice Powell filed a brief concurring opinion in which he appeared to stake out a middle position between the majority and the four dissenting Justices, even though he had purportedly joined the majority's opinion.[87] Whereas the majority suggested that any First Amendment protection for journalists in this area would be limited to instances where the government was using its subpoena powers in bad faith (apparently focusing on the *subjective* motivations of government officials), Justice Powell asserted that such protection would also cover situations where from an *objective* standpoint the government could not demonstrate a sufficient need for the information.[88] Accordingly, if a reporter were requested to provide

> information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement. . . . [T]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.[89]

Thus, while rejecting the notion of a pre-defined journalist privilege that would force the government to meet certain requirements in order to even call a reporter to the witness stand, Justice Powell endorsed a case-by-case balancing approach for reporters seeking to quash a subpoena in a particular case.[90]

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standards for administering a privilege that was more appropriately the province of the legislative branches, including the difficulties associated with defining the "press" entitled to invoke the privilege—the Court declined to create a testimonial privilege as to this type of information. *See id.* at 693–705.

[86] *Id.* at 707.

[87] *Id.* at 709–10 (Powell, J., concurring).

[88] *Id.*

[89] *Id.* at 710.

[90] *See id.* at 710 & n.*. Although Justice Powell's concurrence has frequently been criticized as being ambiguous, see, for example, *id.* at 725 (Stewart, J., dissenting) (labeling that concurrence as "enigmatic"), he later confirmed this reading of his opinion. *See* Zurcher v. Stanford Daily, 436 U.S. 547, 570–71 n.3 (1978) (Powell, J., concurring). Justice Powell asserted that his concurring opinion in *Branzburg*

> noted only that in considering a motion to quash a subpoena directed to a newsman, the court should balance the competing values of a free press and the

Justice Stewart, joined by Justices Brennan and Marshall, argued for the adoption of the sought-after privilege on the grounds of a journalist's First Amendment right to gather news:

> A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated.
>
> ... News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist.[91]

Moreover, "[t]he right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source," because "[i]t is obvious that informants are necessary to the news-gathering process as we know it today."[92] Justice Douglas went further and argued that journalists enjoyed an absolute privilege from appearing before a grand jury unless they themselves were targets of a criminal investigation.[93] Both Justices Stewart and Douglas criticized the majority's characterization of the press' claim as one for special constitutional treatment vis-a-vis other citizens, arguing that it was the press' function of delivering important information to the public that was deserving of special consideration—and not the press *qua* press as a privileged, private actor. [94]

> societal interest in detecting and prosecuting crime. . . . Rather than advocating the creation of a special procedural exception for the press, it approved recognition of First Amendment concerns within the applicable procedure.

Id.

[91] *Id.* at 727–28 (Stewart, J., dissenting) (citation omitted).

[92] *Id.* at 728–29 (Stewart, J., dissenting).

[93] *See* Branzburg v. Hayes, 408 U.S. 665, 711–14, 720–25 (1972) (Douglas, J., dissenting). Justice Douglas based much of his views on the work of First Amendment scholar Alexander Meiklejohn, attributing to him the position that "effective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination." *Id.* at 713–15.

[94] As Justice Stewart argued:

> [A] reporter's right to protect his source is bottomed on the constitutional guarantee of a full flow of information to the public. A newsman's personal First Amendment rights . . . are subsumed under that broad societal interest protected by the First Amendment. Obviously, we are not here concerned with the parochial personal concerns of particular newsmen or informants.

Id. at 726 n.2 (Stewart, J., dissenting). Justice Douglas made a similar point: "The press has a preferred position in our constitutional scheme, not to enable it to make

Thus, in *Branzburg*, it appears that every member of the Court believed that newsgathering was entitled to some First Amendment protection. Although the majority declined to create a specific testimonial privilege for the press in the grand jury context—mainly in resistance to the notion that journalists should be exempt from laws applicable to everyone else—in reaching this conclusion it engaged in a thorough assessment of the impact that compelled testimony might have on the press's ability to gather and report the news. Lacking any solid empirical support for the notion that the flow of news would be detrimentally impacted by the lack of such a privilege, the Court declined to adopt one.[95] But the Court's ultimate decision on this score should not obscure the important First Amendment interests it believed were at stake in the case, and the detailed balancing analysis it engaged in to reach that decision (weighing those interests against society's competing interests in effective law enforcement).[96] Had newsgathering not been entitled to any significant constitutional protection, such a thorough weighing of the competing concerns would have been unnecessary.[97]

Moreover, even as to a specific testimonial privilege for journalists, it appears that the majority may have won the battle but lost the war. Many lower courts have interpreted the position of Justice Powell and the four dissenting Justices as support for at least a case-by-case determination of a First Amendment testimonial privilege for journalists in criminal cases, and virtually all courts recognize some form of such a privilege in civil cases.[98] Such a privilege is

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money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know." *Id.* at 721 (Douglas, J., dissenting).

[95] *Id.* at 691 ("Nothing before us indicates that a large number or percentage of *all* confidential news sources . . . would in any way be deterred by our holding . . . .").

[96] As Justice Powell observed in a later case, "a fair reading of the majority's analysis in *Branzburg* makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated." Saxbe v. Wa. Post Co., 417 U.S. 843, 859–60 (1974) (Powell, J., dissenting). *See also* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 54 n.32 (1987) (implying that the Court had applied First Amendment scrutiny in *Branzburg*, but asserting it was unclear whether the Court had "applied intermediate or deferential scrutiny").

[97] Thus I disagree with the views of at least one commentator who has asserted that "*Branzburg* was an explicit rejection of the press claim to an independent right-to-gather information," and that "the Court reasoned that the process of gathering information from confidential sources was entitled to *no* constitutional protection." *See* Cerruti, *supra* note 21, at 249. Even if one were to ignore the majority's explicit and implicit recognition of "some" First Amendment protection for newsgathering, certainly the case-by-case testimonial privilege advocated by Justice Powell—together with the position of the four dissenting Justices—shows that these assertions are incorrect.

[98] *See* C. THOMAS DIENES ET AL., NEWSGATHERING AND THE LAW 757–65, 853–63 (2d ed. 1999). Indeed, such a privilege has been held to shield a journalist not just against compelled testimony, but against compelled disclosure of many forms of a journalist's work product. *See id.* at 872–92.

squarely based on First Amendment protection for the newsgathering activities of the press.[99]

3. Pell *and* Saxbe: *No "Special" Right of Access to Government-Controlled Information for Newsgathering Purposes*

While both *Zemel* and *Branzburg* dealt with claims that the government was unduly interfering with the ability to gain access to information in the public domain (the sights and sounds of Cuba) or under the control of private individuals (information about criminal activities that was being deliberately shielded from public view), the companion cases of *Pell v. Procunier*[100] and *Saxbe v. Washington Post Co.*[101] concerned claims by the press that the government was unduly restricting its right to gain access to information controlled by the government. At issue were prison regulations that restricted the ability of the press to interview inmates of their choice, as opposed to inmates selectively made available by the prisons themselves.[102] As the *Pell* Court phrased it, the various newspaper reporters asserted a "constitutional right to interview any inmate who [was] willing to speak with them, in the absence of an individualized determination that the particular interview might create a . . . danger to . . . the corrections system."[103] Moreover, "they rely on their right to gather news without governmental interference, which [they] assert includes a right of access to the sources of what is regarded as newsworthy information."[104]

Justice Stewart, writing for the 5-4 majorities in both cases and laying out the controlling legal analysis in *Pell*, rejected the notion that the First Amendment provided the press with a right of access to the sought-after information.[105] The Court initially took pains to point out that there was no attempt by the government to conceal prison conditions or frustrate the press' investigation of them because

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[99] Besides a journalist's privilege grounded in the First Amendment, courts have also derived such a privilege in various cases from common law sources. *See id.* at 767–825. Moreover, many state governments have enacted statutory measures essentially codifying a journalist's privilege—so-called "shield laws." *See id.* Even the federal government recognizes various non-constitutional forms of a journalist's privilege. *See id.* at 825.

[100] 417 U.S. 817 (1974).

[101] 417 U.S. 843 (1974).

[102] *Id.* at 844.

[103] *Pell*, 417 U.S. at 829.

[104] *Id.* at 829–30.

[105] It was somewhat surprising that Justice Stewart, the leading advocate of a First Amendment right to gather information in *Branzburg*, thought that such a right had no application in the context of government-controlled information. For a discussion of the distinction he drew between the rights of the press to gain access to such information versus other types of information, see *infra* notes 237–43 and accompanying text.

"both the press and the general public [were] accorded full opportunities to observe prison conditions" in both cases.[106] Thus, as the majority saw it, the issue was whether "press access to specifically designated prison inmates" was "such an effective and superior method of newsgathering that its curtailment amount[ed] to unconstitutional state interference with a free press."[107] While acknowledging that the Court in *Branzburg* had recognized newsgathering was entitled to some First Amendment protection, the *Pell* Court held that the Constitution did not "require [the] government to accord the press special access to information not shared by members of the public generally."[108] While it was

> one thing to say that a journalist is free to seek out sources of information not available to members of the general public . . . [and] is entitled to some constitutional protection of the confidentiality of such sources, ... [i]t is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court.[109]

Justice Powell filed a lengthy dissent in *Saxbe* that was joined by Justices Brennan and Marshall.[110] While he agreed that the press did not have any "constitutional rights superior to those enjoyed by ordinary citizens,"[111] Justice Powell believed that the press was entitled to special access to government information in situations where general public access was not feasible and the press was acting as an information-gathering agent of the public.[112] Moreover,

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[106] *Pell*, 417 U.S. at 830. Indeed, the Court noted that under the prison regulations at issue, the press enjoyed greater access to the prison than the general public. *Id.* at 830–31.

[107] Pell v. Procunier, 417 U.S. 817, 833 (1974).

[108] *Id.* at 834.

[109] *Id.* at 834–35 (citations omitted). Although all of these statements were made in the *Pell* decision, the Court essentially incorporated the *Pell* decision by reference into *Saxbe* as a basis for the result there as well. *See* Saxbe v. Wa. Post Co., 417 U.S. 843, 850 (1974).

[110] *Saxbe*, 417 U.S. at 850–75. The fact that Justice Powell was leading the dissenting Justices in advocating a First Amendment right of access to government information further clarifies his position in *Branzburg* that newsgathering was entitled to a healthy dose of constitutional protection.

[111] *Id.* at 857 (Powell, J., dissenting).

[112] *See id.* at 863 (Powell, J., dissenting). As Justice Powell argued:

> [F]reedom of speech and press protects two kinds of interests: "There is an individual interest, the need of many men to express their opinions . . . , and a social interest in the attainment of truth . . . ."
>
> What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs. . . . And public debate must not only be unfettered; it must also be informed. . . .

while the government certainly had an interest in protecting the confidentiality or secrecy of some information, or in regulating the time, place or manner of access to non-sensitive information, in this case it had

> no legitimate interest in preventing newsmen from obtaining the information that they may learn through personal interviews or from reporting their findings to the public. Quite to the contrary, federal prisons are public institutions. The administration of these institutions, the effectiveness of their rehabilitative programs, the conditions of confinement that they maintain, and the experiences of the individuals incarcerated therein are all matters of legitimate societal interest and concern.[113]

Justice Douglas filed a separate dissent in *Pell* that was also joined by Justices Brennan and Marshall, in which he made arguments similar to those made by Justice Powell.[114]

> In my view this reasoning also underlies our recognition in *Branzburg* that "news gathering is not without its First Amendment protections . . . ." An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment. That function is recognized by specific reference to the press in the text of the Amendment and by the precedents of this Court . . . .

Id. at 862–63 (Powell, J., dissenting) (citations omitted).

[113] *Id.* at 861 (Powell, J., dissenting).

[114] *See* Pell v. Procunier, 417 U.S. 817, 836–42 (1974) (Douglas, J., dissenting). As Justice Douglas observed:

> It is indeed ironic for the Court to justify the exclusion of the press by noting that the government has gone beyond the press and expanded the exclusion to include the public. Could the government deny the press access to all public institutions and prohibit interviews with all governmental employees? Could it find constitutional footing by expanding the ban to deny such access to everyone?
>
> I agree with the courts below . . . that the absolute ban on press interviews with specifically designated federal inmates is far broader than is necessary to protect any legitimate governmental interests and is an unconstitutional infringement on the public's right to know protected by the free press guarantee of the First Amendment.

Id. at 841. The reason that Justices Douglas and Powell dissented separately may have had to do with the fact that Justices Douglas, Brennan and Marshall also disagreed with a portion of the Court's opinion not discussed here that the *prisoners* themselves had no First Amendment right to engage in selected press interviews, while Justice Powell agreed with this portion of the Court's opinion. *See* 417 U.S. at 835–39.

Given the Court's analysis in *Pell* and *Saxbe*, it seemed that the constitutional balancing which *Branzburg* had suggested was appropriate when the government was interfering with the press' access to sources of newsworthy information would not apply to the press' efforts to gain access to information from government institutions. But the Court's emphasis on the fact that the press and public *did* enjoy "full opportunities" to gain information about prison conditions, apart from designated-prisoner interviews, suggested that the Court might have been limiting its holding to situations where the public already enjoyed a substantial flow of information about the government matters at issue.[115] However, any such interpretations of *Pell* and *Saxbe* were quashed in the next important case to come before the Court.

4. Houchins v. KQED, Inc.: *No "Basic" Right of Access to Government-Controlled Information for Newsgathering Purposes*

Not surprisingly, the Court's holdings in *Pell* and *Saxbe* were soon tested in another prison access case where it could not be maintained that the press was simply seeking a better *method* of gathering information that was otherwise available, because the government had closed off *all* access to certain information.[116] In *Houchins v. KQED, Inc.*,[117] a media broadcasting company

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[115] On this view, the Court's ruling would have been consistent with its earlier decision in *Estes*, holding that the press had no First Amendment right to engage in "more effective" modes of newsgathering as long as some basic access was provided to the information being sought. *See Estes*, 381 U.S. at 539–40 (plurality opinion).

[116] Between its rulings in *Pell-Saxbe* and *Houchins*, the Court decided two other cases involving claims that the government was improperly interfering with the press' newsgathering activities in violation of the First Amendment. The first involved a claim for "more effective access" to government information that had otherwise been made available to the public, similar to that asserted in *Estes*, while the second involved a claim of indirect governmental interference with general newsgathering activities similar to those asserted in *Branzburg*.

In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), relying principally on *Estes*, the Court held that the media had no First Amendment right to obtain physical copies of tape recordings made by President Nixon where the media had listened to, and taken notes about, the contents of the tapes when they had been played in open court. 435 U.S. at 609. Thus, there was "no question of a truncated flow of information to the public"presented by the case. *Id.*

Additionally, in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), a 5-3 majority of the Court again declined to create a special privilege for the press, this time to be exempted from general laws permitting physical searches of locations for evidence of crimes committed by third parties. *Id.* at 541–42.The press had argued that searches of their offices for such evidence unduly burdened both the gathering and reporting of the news. *Id.* at 563. The Court explained that the Fourth Amendment guarantee against unreasonable searches had been adopted mainly to protect against government harassment of the press, and that the Court had already held that Fourth Amendment

and members of the NAACP sued a sheriff who denied the media access to a portion of the county jail that had been the site of a recent suicide by an inmate, as well as the subject of allegations regarding abusive conditions.[118] Emphasizing the public interest at stake in the case and the media's role as the public's agent, the plaintiffs alleged that the sheriff "had violated the First Amendment by refusing to permit media access and failing to provide any effective means by which the public could be informed of conditions prevailing in the Greystone facility or learn of the prisoners' grievances."[119]

In a 4-3 decision which failed to produce a majority opinion,[120] the *Houchins* Court rejected the plaintiffs' claims. Writing for a plurality of three justices, Chief Justice Burger asserted that "[t]his Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control."[121] Characterizing *Branzburg*'s recognition of First Amendment protection for newsgathering as dictum, the plurality explained that these assertions "in no sense implied a constitutional right of access to news sources. . . . There is an undoubted right to gather news 'from any source by means within the law' but that affords no basis for the claim that the First Amendment compels others—private persons or governments—to supply information."[122] Further, the press' "claimed special privilege of access . . . [was] rejected in *Pell* and *Saxbe*, [and is] a right . . . not essential to guarantee the freedom to communicate or publish."[123] In addition, determining who was entitled to access to government institutions was "clearly a legislative task which

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safeguards "must be applied with 'scrupulous exactitude' " where sought-after materials were protected by the First Amendment. *Id.* at 563–65. Accordingly, there was no need for special press protection in this regard. *Id.* at 569.

Thus, while the Court once again declined to create a special exemption for the press to laws of general applicability, it did so only after acknowledging the important First Amendment interests at stake and the fact that its precedents already required special protection for search warrants implicating those interests. The Court did note, however, that in the absence of evidence of government abuse, any incremental impact such searches might have on the press' ability to gather and report the news did "not make a constitutional difference in our judgment." *Id.* at 566. Just as the Court's decision in *Branzburg* prompted more states to pass press shield laws, see *supra* note 99, its decision in *Zurcher* prompted the federal government to pass a law providing the press with special protections against government searches and seizures of press materials. *See* DIENES ET AL., *supra* note 98, at 826–27.

[117] 438 U.S. 1 (1978).

[118] *Id.* at 4–6.

[119] *Id.* at 4.

[120] Justices Marshall and Blackmun did not participate in the case.

[121] *Houchins*, 438 U.S. at 9.

[122] *Id.* at 10–11 (citations omitted).

[123] *Id.* at 12.

the Constitution has left to the political processes,"[124] and public officials, subject to public opinion pressure, might be in a better position to discover and disclose government malfeasance than the press.[125] Further, there were no workable standards for courts to administer a right of access,[126] and the press had other, less convenient, alternatives to learn about prison conditions.[127]

Declining to join the plurality's opinion, Justice Stewart concurred in the judgment to supply the fourth vote against the plaintiffs. He agreed with the plurality that:

> The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors.[128]

But he went on to "part company" with the plurality opinion on the grounds that once the government had opened its doors, the press *was entitled to* special access rights vis a vis the general public to accommodate the press' "special needs" in effectively performing its assigned constitutional role as the information-gathering agent for the public.[129]

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[124] *Id.*

[125] *See id.* at 14. Somewhat curiously, Chief Justice Burger appeared to believe that government officials might have more incentive to disclose government misconduct than representatives of the press.

[126] *See id.* As the Chief Justice explained:

> There is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information. Because the Constitution affords no guidelines, absent statutory standards, hundreds of judges would . . . be at large to fashion ad hoc standards . . . according to their own ideas of what seem[ed] "desirable" or "expedient."

Id.

[127] *See* Houchins v. KQED, Inc., 438 U.S. 1, 12–16 (1978). To lend additional support to all of these arguments, the plurality opinion quoted from a speech that had recently been given by Justice Stewart that appeared to shed additional light on his different positions in *Branzburg* and *Pell* as to the scope of a First Amendment newsgathering right. *See id.* at 14–15 (citing P. Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 636 (1975)). These views are considered in some detail at *infra* notes 237–43 and accompanying text.

[128] *Houchins*, 438 U.S. at 16 (Stewart, J., concurring in the judgment). Justice Stewart explained in a footnote that "[f]orces and factors other than the Constitution must determine what government-held data are to be made available to the public." *Id.* at 16 n.*.

[129] *Id.* at 16–17. Thus,

Justice Stevens dissented in an opinion joined by Justices Brennan and Powell. Objecting to the plurality's reliance on *Pell* and *Saxbe*, he argued that nothing in those cases "intimated that a nondiscriminatory policy of excluding entirely both the public and the press from access to information . . . would avoid constitutional scrutiny."[130] Largely echoing Justice Powell's dissent in those cases, he contended that "[t]he preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment,"[131] and "[w]ithout some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance."[132] Moreover, while "there are unquestionably occasions when governmental activity may properly be carried on in complete secrecy . . . [i]n such situations the reasons for withholding information from the public are both apparent and legitimate."[133] Here, however, the plaintiffs

> simply [sought] an end to petitioner's policy of concealing prison conditions from the public. Those conditions are wholly without claim to confidentiality. While prison officials have an interest in the time and manner of public acquisition of information about the institutions they administer, there is no legitimate penological justification for concealing from citizens the conditions in which their fellow citizens are being confined.[134]

Thus, if any uncertainty lingered after *Pell* and *Saxbe*, the four Justices who produced the judgment of the Court in *Houchins* made it clear that any First Amendment protection for newsgathering activities did not extend to information created or controlled by the government. In effect, the Court was saying that when it came to gaining access to information that the government was unwilling

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> if a television reporter is to convey the jail's sights and sounds to those who cannot personally visit the place, he must use cameras and sound equipment. . . . [T]erms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.

Id. at 17. In other words, the press had a First Amendment right of "effective access" once the government made information available to the public. Although this view appeared to be in substantial tension with the Court's earlier decisions in *Estes* and *Nixon*, *see supra* notes 80 and 116, Justice Stewart made no attempt to reconcile these positions.

130 *Houchins*, 438 U.S. at 27–28 (Stevens, J., dissenting).

131 *Id.* at 30.

132 *Id.* at 32 (footnotes omitted).

133 *Id.* at 34–35.

134 *Id.* at 35–36.

to make available, the flow of such information to the public became a political matter outside the domain of First Amendment concerns.

5. Gannett Co. v. DePasquale: *Hinting at a Reversal of Course as to a Public Right of Access to Government-Controlled Information Under the First Amendment*

In *Pell*, *Saxbe*, and *Houchins*, the press unsuccessfully argued for a right of access to government institutions for the purpose of gathering and disseminating news to the public. Given those defeats the press altered its tactics and, in a case decided just one year after *Houchins*, argued for a *public* right of access to a preliminary hearing in a criminal trial that was closed to the public.[135] In *Gannett Co. v. DePasquale*,[136] a newspaper company argued not only that the public had a right to attend the hearing under the Sixth Amendment,[137] but also that "members of the press and the public have a right of access to the pretrial hearing by reason of the First and Fourteenth Amendments."[138] Focusing most of its attention on the Sixth Amendment claim, the Court, in an opinion authored by Justice Stewart, ultimately concluded "that members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials."[139]

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[135] Between its decisions in *Houchins* and *Gannett Co.*, the Court decided another case where the press alleged undue interference with its newsgathering and reporting activities along the lines alleged in *Branzburg* and *Zurcher*. In *Herbert v. Lando*, 441 U.S. 153 (1979), the Court held that the press was not entitled to a First Amendment privilege from civil discovery laws which permitted defamation plaintiffs to inquire into the editorial decisions made by the press in the course of investigating and publishing a news story. Generally reasoning that the Court had already provided the press with sufficient special protections against defamation actions by making plaintiffs prove that the disputed statements were published with knowing or reckless falsity, the Court would not make it even more difficult for such plaintiffs to meet this additional requirement by erecting hurdles to proving it. *See id.* at 158–78. The Court did note, however, that if a law subjected "the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest . . . it would not survive constitutional scrutiny as the First Amendment is presently construed." *Id.* at 174. Thus, once again the Court refused to exempt the press from generally-applicable rules of criminal and civil procedure, but as in *Zurcher* it largely based its decision on the special First Amendment protections already available to the press to preserve the important interests embodied by that Amendment.

[136] 443 U.S. 368 (1979).

[137] *Id.* at 370–71. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. Const. amend. VI.

[138] *Gannett*, 443 U.S. at 391.

[139] *Id.*

However, somewhat surprisingly given its decision the previous term in *Houchins*, the Court displayed greater receptivity to the First Amendment claim. Instead of rejecting it outright, as one might have expected, the Court observed that the plaintiff was arguing that criminal trials, unlike prisons, had been historically open to the public.[140] It then declared:

> [E]ven assuming, *arguendo*, that the First and Fourteenth Amendments may guarantee such access in some situations, a question we do not decide, . . . the trial court found that the representatives of the press did have a right of access of constitutional dimension, but held, under the circumstances of this case, that this right was outweighed by the defendants' right to a fair trial.[141]

Even more surprisingly, the Court also relied on Justice Powell's *Pell-Saxbe* dissent where he argued that *Branzburg* required a balancing of First Amendment protection for newsgathering against competing government interests even when access was sought to government-controlled information: "In short, the closure decision [by the trial court] was based 'on an assessment of the competing societal interests involved . . . rather than on any determination that First Amendment freedoms were not implicated.' "[142] Satisfied with the trial court's balancing of these interests, the Court held that there was no violation of the First Amendment even if that Amendment did provide a public right of access to the trial.[143]

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[140] *Id.* at 392 and n.24.

[141] *Id.* at 392–93.

[142] *Id.* at 393 (quoting *Saxbe*, 417 U.S. at 860 (Powell, J., dissenting)).

[143] *Id.* at 393–94. As might have been expected given his dissenting positions in *Pell-Saxbe* and *Houchins*, Justice Powell concurred separately and urged the Court to hold explicitly that the plaintiff's reporter had a First Amendment right to attend the criminal trial. *See* 443 U.S. at 397–401 (Powell, J., concurring). Dismayed at this turn of events, Justice Rehnquist—who had opposed a right of access in those cases—also concurred separately to argue that despite the Court's "seeming reservation" of the question:

> [I]t is clear that this Court repeatedly has held that there is no First Amendment right of access in the public or the press to judicial or other governmental proceedings. . . . [T]his Court emphatically has rejected the proposition advanced in Mr. Justice Powell's concurring opinion . . . that the First Amendment is some sort of constitutional 'sunshine law' that requires notice, an opportunity to be heard, and substantial reasons before a governmental proceeding may be closed to the public and press.

Gannett, 443 U.S. at 404–05 (Rehnquist, J., concurring). And four other Justices that dissented on the Court's resolution of the Sixth Amendment question simply observed that "this Court heretofore has not found, and does not today find, any First Amendment right of access to judicial or other governmental proceedings." *Id.* at 411 (Blackmun, J., dissenting).

Thus, in *Gannett*, the Court began hinting at an exception to the rule it had solidified just one year earlier that there was no First Amendment right of access to information controlled by the government. And by repositioning this new right of access as a *public* right, as opposed to one based on the functions of the press in gathering and disseminating information, the Court appeared to be setting the stage for the necessity of justifying any such right on the basis of "freedom of speech" rather than the "freedom of the press" principles debated in the earlier newsgathering cases.

6. Richmond Newspapers *and Progeny: Creating a Public Right of Access to Information Generated in the Context of Criminal Trial Proceedings*

This repositioning of a right of access was consummated the following term in the case of *Richmond Newspapers, Inc. v. Virginia*.[144] There, a court trying a murder case closed the trial to the press and public on an unopposed motion made by the defendant.[145] A newspaper company intervened in the action and objected to the closure, but the trial court reaffirmed its ruling.[146] Failing to get satisfaction in the state appellate courts, the newspaper company appealed to the Supreme Court. In a 7-1 judgment[147] that produced four separate opinions, the Court decided that the First Amendment provided the public with a constitutional right of access to criminal trials.

As in *Houchins*, Chief Justice Burger wrote a plurality opinion joined by only two other Justices. Apparently to distinguish this case from the question of prison access in *Houchins*, the Chief Justice initially described how criminal trials had historically been open to the public.[148] But given that *Pell-Saxbe* and *Houchins* were based on freedom of the press claims, the plurality had to confront, for the first time, the argument that nothing in the text of the First Amendment speaks to a public "right of access" to governmental proceedings.[149] Pointing to that Amendment's protections for speech, press and assembly, the plurality noted that these "freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are

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[144] 448 U.S. 555 (1980) (plurality opinion).

[145] *Id.* at 560.

[146] *Id.* at 562.

[147] Justice Powell did not participate in the case.

[148] Remarkably, however, the Chief Justice made no reference at all to *Houchins* throughout his entire opinion, save for a citation in the last footnote to a relatively minor point that Justice Stewart had made in his separate opinion in that case. *See* 448 U.S. at 581 n.18.

[149] *Id.* at 575–76.

conducted . . . ."[150] Moreover, the Court had acknowledged that certain unarticulated rights are "implicit in enumerated guarantees," and without the right to attend trials "important aspects of freedom of speech and 'of the press could be eviscerated.' "[151] Accordingly, "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."[152]

Joining the Chief Justice's opinion but concurring separately, Justice Stevens proclaimed enthusiastically:

> This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever. . . . I agree that the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch . . . .[153]

However, given that the plurality opinion was limited to criminal trials, Justice Stevens' characterization of the reach of its ruling seemed a bit overstated.

Justices Brennan and Marshall believed that the Chief Justice's approach to this new right of access was too broad, and needed to be justified on more principled grounds.[154] Thus, they concurred in the judgment only, with Justice Brennan writing the concurring opinion. Acknowledging in an understatement that "the First Amendment has not been viewed by the Court in all settings as providing an equally categorical assurance of the correlative freedom of access to information," he nevertheless argued that

> [t]he Court's approach in right-of-access cases simply reflects the special nature of a claim of [a] First Amendment right to gather information. Customarily, First Amendment guarantees are interposed to protect communication between speaker and listener. . . . But the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government.[155]

And since that Amendment's structural role assumes a robust and informed debate on public issues, this model "links the First Amendment to that process of

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[150] *Richmond Newspapers*, 448 U.S. at 575.

[151] *Id.* at 579–80 (citing *Branzburg*).

[152] *Id.* at 581 (footnote omitted).

[153] *Id.* at 582, 584 (Stevens, J., concurring).

[154] This was somewhat ironic given the previous consistent support these Justices had espoused for a First Amendment right to gather news, and the consistent resistance that Chief Justice Burger had earlier displayed towards this right.

[155] *Id.* at 585–87 (Brennan, J., concurring) (emphasis in original).

communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication."[156]

However, because the reach of an information-gathering right was " 'theoretically endless,' . . . it must be invoked with discrimination and temperance. . . . An assertion of the prerogative to gather information must accordingly be assayed by considering the information sought and the opposing interests invaded."[157] To perform this "assaying," he counseled that:

> [A]t least two helpful principles may be sketched. First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. . . . Such a tradition . . . of accessibility implies the favorable judgment of experience. Second, the value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process.[158]

With respect to the first principle, Justice Brennan urged the consultation of "historical and current practice with respect to open trials," including "[t]radition, contemporaneous state practice, and this Court's own decisions . . . ."[159] Regarding the second principle, "the specific structural value of public access in the circumstances" must be assessed.[160] He concluded that both of these principles weighed in favor of a public right of access to criminal trials.[161]

Justice Stewart also concurred in the judgment. In contrast to his straightforward rejection in *Houchins* of "a right of access to information generated or controlled by government,"[162] here Justice Stewart asserted that the First Amendment "clearly give[s] the press and the public a right of access to trials . . . , civil as well as criminal. As has been abundantly demonstrated . . . it

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[156] *Id.* at 588. Interestingly, Justice Brennan's reasoning here tracked his vision of First Amendment freedom of the *press* principles that he had described in a speech less than one year earlier. *See supra* note 52. Only here Justice Brennan was applying it without differentiation to a *public* right of access under general freedom of *speech* principles, a leap that I will argue later may not have been justified or tenable. *See infra* Part III, Section A.

[157] 488 U.S. at 588 (citations and footnotes omitted).

[158] *Id.* at 588–89 (citation omitted).

[159] *Id.* at 589, 593.

[160] *Id.* at 598.

[161] According to Justice Brennan, in the case of criminal trials law and custom manifested an "abiding adherence to the principle of open trials," and public attendance "substantially further[ed] the particular public purposes of that proceeding" by facilitating the appearance and reality of the fair administration of justice. *See id.* at 593–97.

[162] *Houchins*, 438 U.S. at 16.

has for centuries been a basic presupposition of the Anglo-American legal system that trials shall be public trials."[163] While Justice White concurred in the plurality opinion and Justice Blackmun filed an opinion concurring in the judgment, they both wrote separately to indicate that they were voting for a First Amendment right of access only because the Court had incorrectly rejected such a right based on the Sixth Amendment in *Gannett*.[164] Justice Rehnquist filed the lone dissent, arguing that nothing in the Constitution could be fairly read to support a right of access to criminal trials and criticizing the Court majority for improperly expanding federal power at the expense of State rights.[165]

Since *Richmond Newspapers* was such a fragmented decision, it was not until two years later in *Globe Newspaper Co. v. Superior Court*[166] that a majority of the Justices agreed upon a single rationale for this new public right of access. There, a newspaper challenged the closure of a portion of a criminal trial pursuant to a state law that mandated closure during the testimony of minor victims in sex-

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[163] *Richmond Newspapers*, 448 U.S. at 599 (Stewart, J., concurring in the judgment). And in a nod to the textual issues associated with finding a right of "access" in the First Amendment, in a footnote Justice Stewart asserted that "[t]he First Amendment provisions relevant to this case are those protecting free speech and a free press. The right to speak implies a freedom to listen . . . . The right to publish implies a freedom to gather information." *Id.* at 599 n.2 (internal citations omitted). Thus, Justice Stewart seemed to be implying that the *public's* right of access was based on the "right to receive information and ideas" developed by the Court in a separate line of cases, *see supra* Part I, while the *press'* right of access was based on the right to gather information. However, such a distinction was, and is, untenable. As the Court had held, the right to receive information is based on the notion of receiving the speech of a willing speaker. *See supra* Part I. Clearly the government is not a "willing speaker" when it attempts to close judicial proceedings to the public. *See also Houchins*, 438 U.S. at 12 (plurality opinion) (observing that it was a right to gather information or, synonymously, a right of access that was at stake in the context of a government closure of a prison to the public, rather than a "right to receive information and ideas"). Admittedly, however, the Court itself has been guilty of confusing or blurring the lines between the two rights. *See Richmond Newspapers*, 448 U.S. at 576 (plurality opinion) (stating that it was not crucial whether the Court described the right of access to criminal trials as a "right of access" or "right to gather information," but suggesting that the "right to receive information and ideas" might support access as well). In any event, to suggest, as Justice Stewart did, that anyone engaging in "publishing" or "press" activities did not have a right to receive information as well as a right to gather it (at least in so far as these rights have been understood by the Court), seems clearly wrong. However, I will argue that Justice Stewart was largely correct to the extent he was positing that whereas the right to "speak" does not necessarily imply a right to gather information, the right to "publish" very well might in certain limited circumstances. *See infra* Part IV.

[164] *See* 448 U.S. at 581–82 (White, J., concurring); *id.* at 603–04 (Blackmun, J., concurring in the judgment).

[165] *See id.* at 604–06 (Rehnquist, J., dissenting).

[166] 457 U.S. 596 (1982).

offense trials.[167] The Court held that such automatic closures violated the right of access established in *Richmond Newspapers*, reasoning that closure could occur only after it was shown that it was "necessitated by a compelling governmental interest, and [was] narrowly tailored to serve that interest."[168] Revisiting the constitutional basis for this right of access, the Court through Justice Brennan explained:

> Of course, this right of access to criminal trials is not explicitly mentioned in terms in the First Amendment. But we have long eschewed any "narrow, literal conception" of the Amendment's terms, . . . for the Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights. . . . Underlying the First Amendment right of access to criminal trials is the common understanding that "a major purpose of that Amendment was to protect the free discussion of governmental affairs,". . . . By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self government. . . . Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected "discussion of governmental affairs" is an informed one.[169]

The Court then adopted the "two helpful principles" that Justice Brennan had proposed in *Richmond Newspapers* for assaying claims of a right to gather information, as the basis for applying a right of access to criminal trials:

> Two features of the criminal justice system, emphasized in the various opinions in *Richmond Newspapers*, together serve to explain why a right of access to *criminal trials* in particular is properly afforded protection by the First Amendment. First, the criminal trial historically has been open to the press and general public. . . . Second, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. . . . In sum, the institutional value of the open criminal trial is recognized in both logic and experience.[170]

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[167] *Id.* at 599–600.

[168] *Id.* at 607.

[169] *Id.* at 604–05 (citations and quotations omitted).

[170] *Id.* at 605–06 (emphasis in original) (internal citations and footnotes omitted). Justice O'Connor, who had by then replaced Justice Stewart, concurred in the judgment but declined to join the Court's expansive interpretation of the First Amendment:

> I do not interpret [*Richmond Newspapers*] to shelter every right that is "necessary to the enjoyment of other First Amendment rights." . . . Instead, *Richmond Newspapers*

After *Globe Newspaper* the Court decided two other significant cases involving the right of access to criminal trials. In one, this right was extended to cover juror *voir dire* proceedings in a criminal trial,[171] and in the other, it was extended to probable cause hearings.[172] In the second of these decisions, the Court expressly adopted Justice Brennan's "logic and experience" principles as the appropriate standard for assessing a right of access to criminal judicial proceedings beyond the trial itself.[173] Thus, certain proceedings such as grand

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> rests upon our long history of open criminal trials and the special value, for both public and accused, of that openness. . . . Thus, I interpret neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside the context of criminal trials.

Id. at 611 (O'Connor, J., concurring in the judgment). Chief Justice Burger, and Justices Rehnquist and Stevens, dissented in the case. Of particular note, Justice Stevens complained that the case was not ripe for review, and thus was especially unfit for the application of a right of access that had only recently been recognized by the Court and was "plainly not coextensive with the right of expression . . . ." 457 U.S. at 621 (Stevens, J., dissenting).

[171] Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 503 (1984) [hereinafter *Press-Enterprise I*].

[172] Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 12 (1986) [hereinafter *Press-Enterprise II*]. In 1993, in an unremarkable per curiam decision, the Court applied its holding in *Press-Enterprise II* to strike down a Puerto Rican law giving a criminal defendant the right to close a preliminary hearing in a criminal trial proceeding. *See* El Vocero De Puerto Rico v. Puerto Rico, 508 U.S. 147, 149–51 (1993) (per curiam).

[173] As the Court explained:

> In cases dealing with the claim of a First Amendment right of access to criminal proceedings, our decisions have emphasized two complementary considerations. . . . These considerations of experience and logic are, of course, related, for history and experience shape the functioning of governmental processes. If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches.

Press-Enterprise II, 478 U.S. at 8–9. However, apparently backing away slightly from the "compelling interest" standard announced in *Globe Newspaper*, the Court noted that a right of access "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 9 (quoting *Press Enterprise I*, 464 U.S. at 510).

Press-Enterprise I and *II* were otherwise unremarkable decisions except to mark Justice Stevens' increasing dissatisfaction with the right of access that he had so enthusiastically hailed in *Richmond Newspapers*, as it came into conflict with other interests that he viewed as equally, if not more, important (such as juror privacy or the right to a fair trial). In addition to his dissent in *Globe Newspaper*, in *Press-Enterprise I*, he argued that in order to protect juror privacy, the right of access should be applied selectively based on the content of the juror questioning at issue (in contrast to traditional First Amendment principles that ordinarily bar protection from being withheld on the basis of the content of the information or ideas at issue). *See Press-Enterprise I*, 464 U.S. at 519 (Stevens, J., concurring). And in *Press Enterprise II*, he complained that the

jury hearings or jury deliberations that had traditionally been closed to public scrutiny, would presumably not qualify for this new right of access.

In sum, *Richmond Newspapers* created a public right of access to information revealed in criminal trial proceedings purportedly to facilitate a "free discussion of governmental affairs" that is also "an informed one."[174] However, to limit the "theoretically endless" reach of such a right, the Court seemed to carefully limit its application to proceedings associated with criminal trials,[175] and also required that those proceedings have a tradition of public openness and benefit from a public presence. Accordingly, when fully considered, it appears that the Court intended the reach of the *Richmond Newspapers* right to be limited, at least in its initial conception. Nonetheless, basing such a right on broad "freedom of speech" principles, rather than the "freedom of the press" principles that underlied the debate in the newsgathering cases, was a truly substantial development. I will argue later that a meaningful and workable First Amendment right to gather information cannot be based on such broad Speech Clause principles, and that in recognizing a right of access to government-controlled information the Court would have done better to base it on the more narrow Press Clause principles championed by the dissenting Justices in *Branzburg*, *Pell-Saxbe* and *Houchins*.[176]

7. Cohen v. Cowles Media Co.: *A Return to, and "Evisceration" of, the Right of Newsgathering*

One might have expected that the recognition of a public right to acquire certain information in the government context—and especially the Court's application of a heightened standard of scrutiny to impingements on that right—might have signaled a growing recognition on the part of the Court of the value of protecting important information flows. However, this attitude was not discernible in its next case dealing with newsgathering activities. In *Cohen v. Cowles Media Co.*,[177] Cohen, a consultant to a political candidate, provided public court records to the reporters of two different newspapers about minor crimes an opposing candidate had purportedly committed, in exchange for the

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proper standard of review with respect to a right of access should not be one of strict scrutiny, but rather a general balancing of the "information sought and the opposing interests invaded" which Justice Brennan had initially proposed in his *Richmond Newspapers* concurrence. *See* 478 U.S. at 28–29 (Stevens, J., dissenting) (internal quotations and citations omitted). Ironically, it was Justice Brennan himself who authored the opinion in *Globe Newspaper* elevating the standard of review for a right of access to one of strict scrutiny. *See supra* notes 166–69 and accompanying text.

[174] *See Globe Newspaper*, 457 U.S. at 604–05.

[175] *See Press-Enterprise II*, 478 U.S. at 8–10.

[176] *See infra* notes 263–73 and 341–47 and accompanying text.

[177] 501 U.S. 663 (1991).

reporters' promise to keep Cohen's identity confidential.[178] After investigating the records and determining that the charges against the opposing candidate were of a minor nature and had eventually been dismissed or vacated, the papers independently decided to publish the entire story, including the identification of Cohen as the source of the court records.[179] Cohen was fired from his job, and sought to hold the newspapers liable for his damages.[180] The Minnesota Supreme Court determined that the only viable theory of recovery was based on promissory estoppel principles, but held that the newspapers could not, consistent with the First Amendment, be held liable under those laws for breaching their promise of confidentiality.[181]

The Supreme Court reversed in a 5-4 decision authored by Justice White (the author of *Branzburg*).[182] Initially, the Court suggested that the "news" in the case had not been lawfully acquired, and hence fell outside a line of cases holding that the First Amendment protected the press from punishment for publishing lawfully-acquired, truthful information.[183] Instead, the decision was controlled by "the equally well-established line of decisions holding that generally applicable laws [did] not offend the First Amendment simply because their enforcement against the press [had] incidental effects on its ability to gather and report the news."[184] Discussing past decisions where general laws, like the rules of criminal procedure at issue in *Branzburg*, had been enforced against the press, the Court concluded that the "enforcement of such general laws against the press [was] not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations."[185] Moreover, even if such enforcement would inhibit truthful news reporting, "it [was] no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them."[186] The Court then concluded "that the First Amendment [did] not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law . . . ."[187]

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[178] *Id.* at 665–66.

[179] *Id.* at 666.

[180] *Id.*

[181] *Id.* at 668–72.

[182] *See generally id.* Of the five important information-gathering decisions decided prior to *Cohen*—*Zemel*, *Branzburg*, *Pell-Saxbe*, *Houchins*, and *Richmond Newspapers*—three of these (*Branzburg*, *Pell-Saxbe*, and *Houchins*) were decided by a one-vote margin. *Cohen* would make that four out of six, or two-thirds of the cases.

[183] *Cohen*, 501 U.S. at 668–69.

[184] *Id.* at 669.

[185] *Id.* at 670.

[186] *Id.* at 672.

[187] *Id.*

Justice Souter filed a dissent that was joined by Justices Marshall, Blackmun and O'Connor,[188] and argued that there was " 'nothing talismanic about neutral laws of general applicability'... for such laws may restrict First Amendment rights just as effectively as those directed at speech itself."[189] Thus, he contended, as in previous cases the interests promoted by the general laws should have been balanced against the First Amendment interests at stake. And although the circumstances under which newspapers acquired their information was relevant to the balance, given the importance of putting Cohen's information in context "the State's interest in enforcing [the] newspaper's promise of confidentiality [was] insufficient to outweigh the interest in unfettered publication of the information revealed in [the] case."[190]

The Court's approach in *Cohen* appeared to depart dramatically from the balancing analysis it utilized in *Branzburg* to resolve the conflict between the general laws at issue there (i.e., the rules of criminal procedure) and the First Amendment protection it had accorded to newsgathering activities. In essence, the Court seemed to say that the First Amendment would no longer be relevant where newsgathering or publishing activities conflicted with general laws. On the other hand, the Court's judgment in *Cohen* was consistent with the protection for newsgathering it recognized in *Branzburg,* since the enforcement of promises of confidentiality made to news sources would only make such sources more likely to reveal information to reporters. Indeed, the press in *Branzburg* argued that it was necessary for it to keep such promises in order to effectively gather the news. Thus, the only real burden imposed by the promissory estoppel laws in *Cohen* was on the press' ability to disclose the plaintiff's identity, which seemed to be a far cry from burdening its ability to acquire newsworthy information in the first place.[191]

Accordingly, it is not clear whether the Court really intended to eliminate any First Amendment protection for newsgathering activities in all future conflicts involving laws of general application. Nonetheless, its broad, sweeping pronouncements in this regard appear to require this result. Until the Court

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[188] *Cohen*, 501 U.S. at 676. Justice Blackmun, joined by Justices Marshall and Souter, also dissented separately on the grounds that the State was effectively punishing the publication of truthful speech on the basis of its content absent a compelling interest in doing so. *See id.* at 672–76 (Blackmun, J., dissenting).

[189] *Id.* at 677 (Souter, J., dissenting) (quoting *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 901 (1990) (O'Connor, J., concurring in the judgment)).

[190] *Cohen*, 501 U.S. at 679.

[191] As the Minnesota Supreme Court observed on remand in upholding a promissory estoppel judgment against the press, there were other ways the newspapers could have achieved its objective of informing the public about the questionable source of the story without breaching its promise to Cohen and specifically identifying him. *See* Cohen v. Cowles Media Co., 479 N.W.2d 387, 391 (Minn. 1992).

indicates otherwise, *Cohen* would seem to dictate that when newsgathering activities conflict with generally applicable laws such as tort, contract, or property laws, or even rules of criminal or civil procedure of the type at issue in *Branzburg*, a First Amendment balancing of interests will no longer be appropriate. As I will argue later, such an approach to facilitating modern flows of information to the public regarding matters of public concern is inadequate.[192]

8. Los Angeles Police Dep't v. United Reporting Publishing Co.: *A Return to the Right of Access to Government-Controlled Information: Signaling the Limited Scope of* Richmond Newspapers?

Lastly, the Court's most recent encounter with an information-gathering right occurred in the context of access to government information.[193] But because it dealt tangentially with the right of access, *Los Angeles Police Department v. United Reporting Publishing Co.*[194] is probably less important for its specific holding than for what it reveals about how the current members of the Court view that right. In *United Reporting*, a company that collected names and addresses of arrested individuals from police reports and sold them for use in commercial mailing lists challenged a new California law denying access to the arrestee's addresses for commercial purposes.[195] The lower courts determined that the new law was an indirect restriction on commercial speech and thus violated the First Amendment on its face.[196]

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[192] *See infra* Part III, Section B. Moreover, I will suggest other ways in which *Cohen* might be distinguished from *Branzburg* and lead one to conclude that First Amendment scrutiny may still be appropriate with respect to some laws of general applicability that conflict with newsgathering activities. *See infra* notes 284–302 and accompanying text.

[193] In Wilson v. Layne, 526 U.S. 603 (1999), decided between the Court's decisions in *Cohen* and *United Reporting*, the Court gave short shrift to an argument of the news media that its First Amendment right "to facilitate accurate reporting on law enforcement activities" overrode an individual's Fourth Amendment right to be free of police searches of private homes involving "media ride-alongs." *Id.* at 612–13. As the Court observed,

> [T]he Fourth Amendment also protects a very important right, and in the present case it is in terms of that right that the media ride-alongs must be judged. . . . [E]ven the need for accurate reporting on police issues in general bears no direct relation to the constitutional justification for the police intrusion into a home in order to execute a felony arrest warrant.

Id. at 613.

[194] 528 U.S. 32 (1999).

[195] *Id.* at 34.

[196] United Reporting Publ'g Corp. v. Ca. Highway Patrol, 146 F.3d 1133 (9th Cir. 1998); United Reporting Publ'g Corp. v. Lungren, 946 F. Supp. 822 (S.D. Cal. 1996).

The Court reversed, holding that the lower courts erred in entertaining a facial challenge to the new law, and remanded for consideration of its constitutionality on an "as applied" basis.[197] According to Chief Justice Rehnquist, who authored the majority opinion, the facial invalidation of the law was improper under the Court's overbreadth doctrine because it was "simply a law regulating access to information in the hands of the police department" rather than a law "regulat[ing] or proscrib[ing] speech . . . ."[198] As the Court explained:

> Facial overbreadth adjudication is an exception to our traditional rules of practice and . . . its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws . . . .[199]

And in this case "what [the Court has] before [it] is nothing more than a governmental denial of access to information in its possession. California could [have] decide[d] not to give out arrestee information at all without violating the First Amendment. *Cf. Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978)."[200]

Although six other Justices joined the Chief Justice's opinion, all of them wrote or joined concurring opinions. Justice Ginsburg, joined by Justices O'Connor, Souter, and Breyer, contended the fact that the amendment at issue was "properly analyzed as a restriction on access to government information, not as a restriction on speech," was sufficient grounds in and of itself for reversal.[201] In their view, "California could, as the Court notes, constitutionally decide not to give out arrestee address information at all."[202] Accordingly, the release of the addresses was in the nature of a subsidy, which California could choose to provide to some speakers and not others as long as it did not discriminate on the basis of "an illegitimate criterion such as viewpoint."[203]

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[197] *Id.* at 40–41.

[198] *Id.* at 38, 40.

[199] *Id.* at 39–40 (internal citations and quotations omitted).

[200] *Id.* at 40 (internal footnote and citations omitted).

[201] *Los Angeles Police Dep't*, 528 U.S. at 42 (Ginsburg, J., concurring).

[202] *Id.* at 43.

[203] *Id.* Moreover, Justice Ginsburg argued, "if States were required to choose between keeping proprietary information to themselves and making it available without limits, States might well choose the former option. In that event, disallowing selective disclosure would lead not to more speech overall but to more secrecy and less speech." *Id.* Hence, "society's interest in the free flow of information might argue for upholding laws like the one at issue in this case rather than imposing an all-or-nothing regime under which 'nothing' could be a State's easiest response." *Id.* at 44. Justice Scalia, joined by Justice Thomas, agreed with the Court's disposition of the facial challenge, but in contrast to Justice Ginsburg suggested that the law was vulnerable to an as-applied

In dissent, Justices Stevens and Kennedy expressed the view that the law had been challenged on an as-applied basis in the lower courts, and argued that the law was an unconstitutional restriction on commercial speech because it discriminated between commercial and non-commercial users of the information.[204] They also suggested that the State could have avoided the whole problem by simply denying everyone access to the arrestee addresses, or even by discriminating between those requesting access on a basis other than disfavored speech purposes.[205] Thus, because the amendment was

> [r]eally a restriction on access to government information rather than a direct restriction on protected speech, . . . the majority is surely correct in observing that California could decide not to give out arrestee information at all without violating the First Amendment. . . . Moreover, I think it equally clear that California could release the information on a selective basis to a limited group of users who have a special, and legitimate, need for the information.[206]

Thus, in *United Reporting*, the majority opinion, the dissenting opinion, and Justice Ginsburg's concurring opinion each stated explicitly that California could have withheld the arrestee address information from the public without violating the First Amendment. And the only citation of authority for this proposition was the Chief Justice's "cf." citation to *Houchins* in the majority opinion, which both Justice Ginsburg and Justice Stevens incorporated by reference as the sole support for their agreement on this issue.[207] Given the public right of access to certain types of government information recognized in *Richmond Newspapers*, and the fact that the plaintiff in *United Reporting* argued for an extension of this right, it was surprising that the Court flatly rejected this claim without as much as a mention of it.[208]

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challenge as an indirect restriction on commercial speech. *See id.* at 41–42 (Scalia, J., concurring).

[204] *Los Angeles Police Dep't*, 528 U.S. at 44, 46 (Stevens, J., dissenting).

[205] *Id.* at 45 (Stevens, J., dissenting).

[206] *Id.* (internal quotations omitted).

[207] *See id.* at 43 (Ginsburg, J., concurring); *id.* at 45 (Stevens, J., dissenting).

[208] *See* Respondent's Brief at 41–44. The Court's failure to even consider the applicability of the *Richmond Newspapers* right of access was particularly surprising in view of the fact that at least one federal court of appeals judge had argued in an earlier case that a state's criminal justice records, including arrestee addresses, did meet the "experience and logic" test of *Richmond Newspapers*. *See* Lanphere & Urbaniak v. State of Colorado, 21 F.3d 1508, 1516–20 (10th Cir. 1994) (Aldisert, J., dissenting) (arguing that the *Richmond Newspapers* test did apply to criminal justice records and that there was a public right of access under that test to use such records for solicitation by attorneys and substance abuse counselors). *United Reporting* highlighted Judge Aldisert's dissent in its brief to the Court. *See* Respondent's Brief at 37–38.

Logically, there are at least two potential explanations for the Court's dismissive treatment of this argument. On the one hand, it may indicate that the Court views the *Richmond Newspapers* right of access as having limited applicability outside the context of criminal judicial proceedings. On the other hand, given the personal nature of the arrestee information at issue in the case—which Justice Ginsburg labeled in her concurrence as "proprietary information"[209]—even if the Court believed that the "experience and logic" standard of *Richmond Newspapers* might apply to government information outside of judicial proceedings (as Justice Brennan seems to have originally intended in his *Richmond Newspapers* concurrence), the Justices may have made a silent assessment in *United Reporting* that public access to arrestee addresses (and particularly for commercial purposes) did not meet that standard. Either way, the Court signaled that any person attempting to expand the *Richmond Newspapers* right of access beyond its current moorings may well bear a significant burden in doing so.

B. *Conclusions on a Right to Gather Information Under Existing Supreme Court Precedent*

To sum up the Court's jurisprudence with respect to a First Amendment right to gather information, in *Zemel* it ruled that general information-gathering activities engaged in for speech-related purposes did not implicate First Amendment concerns. Then in *Branzburg*, it indicated that newsgathering activities were entitled to some constitutional protection and that a general balancing of such interests against competing governmental interests would be appropriate where conflicts arose. However, in *Pell-Saxbe* and *Houchins*, the Court held that any such protection for newsgathering did not extend to efforts to gain access to government-controlled information. But then in the *Richmond Newspapers* line of cases, the Court created an exception for criminal judicial proceedings and created a *public* right of access to such proceedings. More recently, in *Cohen*, the Court appeared to substantially eliminate the protection for general newsgathering activities recognized in *Branzburg*, at least in cases presenting conflicts between such activities and laws of general application. And in *United Reporting*, the Court signaled that the right of access to government information recognized in *Richmond Newspapers* might have limited application outside the context of judicial proceedings.

What, then, can be said about the existing contours of a right to gather information? Under the foregoing cases, the Court appears to have created two important distinctions in terms of First Amendment protection accorded to information-gathering activities. The first concerns the source of the information being sought, and specifically whether the information is created or controlled by

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[209] *See supra* note 203.

the government or whether it is to be gathered from other sources. With respect to governmental information, *Houchins* (and to some extent *United Reporting*) rejects a First Amendment right to gain access to such information, except to the extent *Richmond Newspapers* and progeny created a limited right of access.

The second distinction is relevant for all other information—i.e., that available in the public domain or under the control of private or non-governmental parties.[210] The Court in *Branzburg* recognized that newsgathering is entitled to some First Amendment protection, but also suggested in *Zemel* that information gathering by members of the general public did not merit First Amendment consideration. And because the Court in *Branzburg* based what protection it did accord to newsgathering on "freedom of the press" principles, it seems to have created a general perception among lower courts that the acquisition of "news" by the press is the only (or at least the main) type of information-gathering activity that merits constitutional protection.[211] And while *Cohen* appears to have limited the scope of protection *Branzburg* bestowed on newsgathering activities incidentally burdened by laws of general application, presumably *Branzburg* retains whatever vitality it originally had when laws aim to restrict, or disproportionately burden, the newsgathering activities of the press.[212]

C. *Summary of Lower Court Interpretations and Application of Supreme Court's Information-Gathering Jurisprudence*

Although a detailed survey of the numerous lower court decisions applying the foregoing decisions of the Court is beyond the scope of this Article, it is possible to summarize several patterns and trends in these cases.

First, with respect to a First Amendment right of access to governmental information, most courts reject such a right on the basis of *Houchins* except in the area of governmental proceedings or related records where a claimant can demonstrate that the *Richmond Newspapers* standards of "experience and logic" have been satisfied. More specifically, most courts have rejected a constitutional right of access to government records or facilities under the control of the executive or legislative branches (including administrative agencies), either relying outright on *Houchins* (and more recently on *United Reporting*), or by finding that the *Richmond Newspapers* standards of "experience and logic" do not

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[210] Of course, information from such non-governmental sources can certainly include information *about* government that can be obtained from the public domain or private sources.

[211] *See infra* notes 216–18 and accompanying text.

[212] *See infra* notes 221–22 and accompanying text.

apply to such information.[213] By contrast, under those standards many courts have recognized a right of access to both criminal and civil judicial proceedings that have been traditionally open to the public, as well as documents and records normally made public in connection with those proceedings.[214] However, courts have reached different conclusions as to a right of access to government proceedings outside of the context of judicial proceedings.[215]

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[213] With respect to *government records*, see, e.g., Ctr. for Nat'l Sec. Studies v. Dep't of Justice, 331 F.3d. 918, 933–36 (D.C. Cir. 2003) (holding that there was no First Amendment right of access to records re detainments of individuals in connection with Sept. 11 terrorism investigation), *cert. denied*, 124 S. Ct. 1041 (2004); United States v. Miami Univ., 294 F.3d 797, 823–24 (6th Cir. 2002) (same regarding records of state university student disciplinary records); Pfeiffer v. CIA, 60 F.3d 861, 866 (D.C. Cir. 1995) (same regarding certain CIA records); ACLU v. Mississippi, 911 F.2d 1066, 1071–72 (5th Cir. 1990), *aff'd*, ALCU v. King, 84 F.3d 784, 785 (5th Cir. 1996) (same regarding records of a disbanded state agency devoted to maintaining racial segregation); Calder v. I.R.S., 890 F.2d 781, 783–84 (5th Cir. 1989) (same regarding IRS records of its investigation of Al Capone); Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1166–76 (3d Cir. 1986) (same regarding state environmental agency records of water contamination investigation); Ohio Contractors Assoc. v. City of Columbus, 733 F. Supp. 1156, 1163–65 (S.D. Ohio 1990) (same regarding the city's construction bidding records). *But see* Cal-Almond, Inc. v. Dep't of Agric., 960 F.2d 105, 109–110 (9th Cir. 1992) (suggesting there was a First Amendment right of access to USDA voter referendum records); Bauer v. Kincaid, 759 F. Supp. 575, 593–95 (W.D. Mo. 1991) (finding First Amendment right of access to incident records of state university campus police).

As to *government facilities*, *see, e.g.*, Phillips v. Bureau of Prisons, 591 F.2d 966 (D.C. Cir. 1979) (paralegal had no First Amendment right of access to prison to interview prisoner); United States v. Maldonado-Norat, 122 F. Supp. 2d 264 (D.P.R. 2000) (journalists had no right of access to enter Vieques naval base to cover protests), SEARCH v. Pena, No. CIV.A.95-1289SSH, 1995 WL 669235, at *1 (D.D.C. July 31, 1995) (scientist had no right to enter restricted waters to sample for nuclear contamination around submarine decommissioning facility); New Mexico v. McCormack, 682 P.2d 742 (N.M. Ct. App. 1984) (journalists had no right of access to protest buffer zone at DOE nuclear waste construction site).

[214] *See, e.g.*, Detroit Free Press v. Ashcroft, 303 F.3d 681, 695 n.11 (6th Cir. 2002) (observing that "a number of circuits . . . . have . . . agreed that the press and public have a First Amendment right to attend civil proceedings under [two-part *Richmond Newspapers*] test"); *In re* Providence Journal Co., 293 F.3d 1, 10 (1st Cir. 2002) (observing that First Amendment right of access under *Richmond Newspapers* "extends to documents and kindred materials submitted in connection with the prosecution and defense of criminal proceedings"); *see also generally* DIENES ET AL., *supra* note 98, at 71–156, 179–298.

[215] *Compare* North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) (rejecting First Amendment right of access to attend deportation proceedings connected with Sept. 11 terrorism investigations), *with Detroit Free Press*, 303 F.3d at 683 (finding a First Amendment right to attend such proceedings). *Compare also* Cal. First Amendment Coalition v. Woodford, 299 F.3d 868, 873 (9th Cir. 2002) (finding right

Second, as to a right to be free from undue interference in gathering information from non-governmental sources, relying on *Branzburg* courts have generally held that newsgathering activities enjoy some measure of First Amendment protection.[216] Moreover, courts have been fairly liberal in construing "newsgathering" to include information gathered for special-interest publications or television productions, in addition to traditional news publications and broadcast news programs.[217] Outside of the newsgathering context however, even when parties have alleged a definite speech or publishing purpose for engaging in certain information-gathering activities, courts have been more reluctant to extend First Amendment protection to them on the basis of *Zemel*.[218]

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of access to prisoner execution), Whiteland Woods, L.P. v. Township of W. Whiteland, 193 F.3d 177, 180–81 (3d Cir. 1999) (same regarding township commission planning meetings) *and* Soc'y of Prof'l Journalists v. Sec'y of Labor, 616 F. Supp. 569, 575 (D. Utah 1985) (same regarding administrative safety hearing), *with* JB Pictures v. Dep't. of Defense, 86 F.3d 236, 239 (D.C. Cir. 1996) (rejecting right of access to military ceremony) and First Amendment Coalition v. Judicial Inquiry and Review Bd., 784 F.2d 467, 472 (3d Cir. 1986) (same regarding state board investigating judicial misconduct).

[216] *See, e.g.*, Daily Herald Co. v. Munro, 838 F.2d 380, 384 (9th Cir. 1988) (asserting that "the First Amendment protects the media's right to gather news"); Von Bulow v. Von Bulow, 811 F.2d 136, 142 (2d Cir. 1987) ("[T]he process of newsgathering is a protected right under the First Amendment, albeit a qualified one."); United States v. Espy, 31 F. Supp. 2d 1, 2 (D.D.C. 1998) ("There can be no question but that the press has a right under the First Amendment of the United States Constitution to gather information . . . ."); CBS, Inc. v. Smith, 681 F. Supp. 794, 803 (S.D. Fla. 1988) ("Simply put, newsgathering is a basic right protected by the First Amendment . . . .").

[217] *See, e.g.*, Southwell v. Southern Poverty Law Ctr., 949 F. Supp. 1303, 1315 (W.D. Mich. 1996) (holding that a public interest law group that published a newsletter was entitled to invoke First Amendment journalist privilege to withhold identity of confidential source); New Kids on the Block v. News Am. Publ'g, Inc., 745 F. Supp. 1540, 1547 (C.D. Cal. 1990), *aff'd on other grounds*, 971 F.2d 303, 309 (9th Cir. 1992) (holding that a celebrity magazine had a First Amendment newsgathering right to use the rock band's name in connection with a poll about the band).

[218] *See, e.g.*, Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1441 (9th Cir. 1996) (holding that an educational travel group had no First Amendment right to travel to Cuba to gather information for its use in a debate about Cuban embargo; "where a person seeks only to gather information, no First Amendment rights are implicated"); Walsh v. Brady, 927 F.2d 1229, 1234–35 (D.C. Cir. 1991) (holding that an importer of political posters from Cuba had no First Amendment right to personally gather information in Cuba in order to arrange for importation and the sale of posters); *accord* SEARCH v. Pena, No. Civ. A. 95-1289 SSH, 1995 WL 669235 at *3 (D.D.C. July 31, 1995) (The court held that a public interest group seeking to test the waters surrounding a nuclear submarine facility could not term its exclusion from it "a violation of their First Amendment rights by insisting that their lack of access to a restricted military zone effectively prevents them from speaking and publishing"); Bennett v. Fieser, 152 F.R.D. 641, 644 (D. Kan. 1994) (holding that where a protective order of the court barred civil plaintiffs from conducting an independent investigation of certain facts, such an order

Lastly, regarding the level of protection accorded to newsgathering activities, prior to *Cohen* courts seemed to acknowledge at least the appropriateness in some situations of a *Branzburg*-type balancing analysis to resolve alleged conflicts between those activities and the laws intended to regulate conduct generally.[219] However, since *Cohen* many courts appear to dismiss, with little or no consideration, the First Amendment interests involved in such conflicts.[220] But in

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only "limit[ed] their right to gather information. Therefore, first amendment concerns [were] not implicated by the court's requirement.").

However, one area in which courts appear to be more inclined to extend First Amendment protection for information gathering beyond the sphere of "newsgathering" is in the application of a so-called "journalists" privilege against the compelled disclosure of work product. *See, e.g.*, Cusumano v. Microsoft Corp., 162 F.3d 708, 714–15 (1st Cir. 1998) (journalist privilege extended to academic researcher who acquired information in connection with investigating a book); *see also* DIENES ET AL., *supra* note 98, at 847–52 & n.63, 67 (discussing how journalists' privilege has also been extended to freelance investigative book authors, documentary filmmakers and a political advocacy group researcher, but also how some courts have reserved the question of whether a history writer, academic researchers, and a "virtually unpublished freelance writer operating without an employer or contract for publication" are entitled to invoke it). See generally *supra* notes 98–99, for additional discussion of a journalists' privilege under the First Amendment.

[219] *See, e.g.*, United States v. Morison, 844 F.2d 1057, 1082 (4th Cir. 1988) (rejecting First Amendment protection for violation of espionage law by government employee that leaked secret government information to the media, but majority of judges observing that "aggressive balancing" normally undertaken "to balance the value of unrestricted newsgathering against other public interests" must yield to more deferential review in context of national security secrets); Reporters Comm. for Freedom of the Press v. Am. Tel. & Tel. Co., 593 F.2d 1030, 1073, 1085 (D.C. Cir. 1978) (rejecting a newsgathering defense to subpoenas for journalist toll-call records in law enforcement investigations, but concurring and dissenting judge on 3–judge panel appearing to balance First Amendment interests at issue in case); Galella v. Onassis, 487 F.2d 986, 995–96 (2d Cir. 1973) (rejecting newsgathering defense for harassment and invasion of privacy of a public figure, but observing that "legitimate countervailing social needs may warrant some intrusion despite an individual's reasonable expectation of privacy and freedom from harassment," but "interference allowed may be no greater than that necessary to protect the overriding public interest"). *But see, e.g.*, Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971) (asserting that the First Amendment had "never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering").

[220] *See, e.g.*, Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 520 (4th Cir. 1999) (relying on *Cohen* to reject consideration of a First Amendment defense to tort liability regarding an undercover news investigation of improper food handling practices by a grocery chain); W.D.I.A. Corp. v. McGraw-Hill, Inc., 34 F. Supp. 2d 612, 624 (S.D. Ohio 1998) (same regarding tort and breach of contract liability for an investigative magazine article on the ease of access to consumer credit information); Risenhoover v. England, 936 F. Supp. 392, 403–05 (W.D. Tex. 1996) (same regarding tort liability relating to the news coverage of an FBI standoff with a religious cult at Waco);

the case of laws or government actions alleged to target the newsgathering activities of the press, courts appear much more willing to apply a vigorous level of First Amendment scrutiny. Thus, for example, laws designed to restrict media exit polling of voters within certain distances of polling places, orders by a trial judge restricting media interviews of jurors or other participants in a trial, or police conduct unreasonably interfering with the media's access to or ability to record events in the public domain, have all been held to violate the First Amendment.[221] Moreover, any form of discriminatory treatment of

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Dickerson v. Raphael, 564 N.W.2d 85, 92 (Mich. Ct. App. 1997), *rev'd on other grounds*, 601 N.W.2d 108 (Mich. 1997) (same regarding a violation of eavesdropping statutes in connection with an investigation of a religious cult). However, in cases where plaintiffs have alleged *damages* of a reputational nature stemming from a publication derived from alleged newsgathering torts or other wrongful conduct by the media, many courts have held that the First Amendment bars recovery of such damages on the basis of the Court's decision in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (requiring a showing of *New York Times'* actual malice for recovery in tort actions alleging defamation-type reputational harm caused by media publications); *see, e.g.*, *Food Lion, Inc.*, 194 F.3d at 522–24 (permitting recovery of nominal damages for newsgathering tort violations, but barring reputational damages caused by publication itself).

One major exception to the *Cohen* rule of no First Amendment scrutiny in conflicts between newsgathering activities and general laws seems to be in the area of an asserted journalist privilege against compliance with general rules of civil procedure where parties demand that journalists disclose information or materials obtained in the course of their investigations. Apparently taking the view that *Cohen* does not supplant *Branzburg* in all newsgathering cases, lower courts almost overwhelmingly disregard *Cohen* in this context and grant *bona fide* journalists a First Amendment privilege regarding compliance with such rules. *See supra* notes 98–99 and accompanying text.

[221] With respect to *voter polling laws*, see, e.g., *Daily Herald Co. v. Munro*, 838 F.2d 380, 384 n.3 (9th Cir. 1988) (law prohibiting exit polling within 300 feet of polling places violated the First Amendment as an unconstitutional restriction on speech in a public forum; declining to analyze as a "right of access" case, but noting that the law would likely violate such principles). *See also id.* at 389–90 (Rienhardt, J. concurring) (agreeing with a public forum analysis but also arguing that the law violated the right of "media and, more important, the right of society to gather and disseminate information important to the democratic political process"); CBS, Inc. v. Smith, 681 F. Supp. 794, 802 (S.D. Fla. 1988) (holding that a law prohibiting the solicitation of voters within 150 feet of polling places violated the newsgathering and free speech rights of the press).

As to *restrictions of media interviews with jurors or other trial participants*, see, e.g., *Davis v. E. Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 929 (5th Cir. 1996) (holding that a gag order on certain participants issued during a trial violated the media's newsgathering right and right to receive information). *See also* Journal Publ'g Co. v. Mechem, 801 F.2d 1233, 1237 (10th Cir. 1986) (holding that a broad post-trial juror gag order was an invalid prior restraint on the media's newsgathering right); United States v. Brown, 250 F.3d 907, 917–18 (5th Cir. 2001) (holding that an order during trial prohibiting the circumvention of a juror anonymity rule via the media's independent investigation into juror identities was an impermissible prior restraint on the media's right to *report* the news). The application by the court in *Journal Publishing Co.* and other

newsgatherers by government officials tends to be scrutinized closely from a First Amendment perspective.[222]

In the next section of this Article, the soundness of the foregoing distinctions and patterns in the treatment of a right to gather information will be analyzed from the perspective of the Court's First Amendment jurisprudence as a whole, as well as from the perspective of desirable First Amendment policy. Following that, I will propose principles on which a consistent and cohesive information-gathering jurisprudence might be premised. This will have implications not only for a more uniform treatment of the variety of cases in this area, but also for the willingness of the Court to extend additional protection to information-gathering activities where it might be merited without undue concern that it would be letting an unmanageable "cat" of "theoretically endless" protection out of the bag.

III. CRITIQUE OF COURT'S INFORMATION-GATHERING JURISPRUDENCE

In Part II, I concluded that the Court has created different standards of First Amendment protection for information-gathering activities depending on (1) whether the information is being sought from governmental or non-governmental sources, and (2) in the context of non-governmental sources, whether it is being sought by the organized press or other members of society. This Part explores whether these distinctions are warranted or desirable in light of general First Amendment principles and desirable constitutional policy.

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lower courts of the prior restraint doctrine to newsgathering activities seems questionable in light of the traditional application of that doctrine to restraints on *publication*. Even more questionable was the *Brown* court's treatment of a restraint on newsgathering as equivalent to a restraint on publication itself, blurring the "speech-gathering" distinction altogether. However, an extended analysis and discussion of these issues is beyond the scope of this Article.

Regarding *police interference with newsgathering regarding public events such as demonstrations or accident scenes*, see *supra* notes 15–16 and accompanying text.

[222] *See, e.g.*, ABC v. Cuomo, 570 F.2d 1080, 1084 (2d Cir. 1977) (ordering the district court to enjoin the threatened application of criminal trespass laws against a television network seeking to broadcast post-election activities at candidate headquarters when other major networks were allowed access to the broadcast events); Sherrill v. Knight, 569 F.2d 124, 130 (D.C. Cir. 1977) (ruling that the Secret Service's denial of a White House press pass to a particular journalist had to be based on the government's articulation of a compelling interest given the important newsgathering interests at stake); United Teachers of Dade v. Stierheim, 213 F. Supp. 2d 1368, 1374 (S.D. Fla. 2002) (enjoining a school board's assignment of the accredited teachers' union newspaper reporters to a media room different than the "general-circulation media" where plaintiffs were "deprived of the same news gathering environment and opportunities" afforded to general media).

A. *Information Gathering From Governmental Sources*

As discussed in Part II, the Court has declined to recognize the existence of a First Amendment right to gather information from government sources outside of the discrete area of criminal judicial proceedings, while at the same time it has recognized that there is some form of a First Amendment right to gather "news" outside of the government context. And the protection that the Court did accord to acquiring information about criminal judicial proceedings was justified on very broad freedom of speech principles, which was a departure from its earlier newsgathering cases where the debate centered on more narrow First Amendment principles involving the freedom of the press. These points will be taken up in the order I have raised them.

1. *Constitutional Standards Governing the Gathering of Information from Governmental Versus Non-Governmental Sources*

Initially, it seems fair to ask whether it makes sense to say that the First Amendment does or does not apply to information-gathering activities depending on whether one is seeking to acquire information from the government versus other sources of information. Preliminarily, this state of affairs seems undesirable for two main reasons.

First, where the Court has created a set of rules that operate to accord some protection to the gathering of information from non-governmental sources, but none to acquiring information from the government except in a very discrete category of government affairs (i.e., criminal trials), such rules appear to turn the First Amendment on its head. Given the Court's repeated admonitions that the protection of speech of a political nature lies at the "core" of the First Amendment, these rules seem highly ironic in that government information that is by definition "political" receives less overall protection than information that is not necessarily political (and frequently will not be).

Second, to have the existence of a First Amendment right depend on the type or content of the information being gathered creates substantial tension with traditional First Amendment principles that generally require government regulation of conduct associated with speech to be on a content-neutral basis. As discussed earlier, government restrictions on the "time, place or manner" of speech, or the non-expressive components of expressive or symbolic conduct, are subject to an "intermediate" versus "strict" level of constitutional scrutiny only if the government is regulating the conduct on a basis that is neutral with respect to the content of the speech at issue.[223] This neutrality is generally required not only with respect to the specific viewpoint of a speaker, but also with regard to the

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[223] *See supra* notes 32–34 and accompanying text.

general subject matter of the ideas or information being expressed.[224] Certainly the government has compelling interests in restricting certain information-gathering activities based on the content or type of some forms of information—such as information regarding national security matters—but the point is that under traditional free speech principles, such alleged interests are normally weighed against the First Amendment value of the speech that the government is claiming implicates those interests, rather than simply deferring to the government's view that such speech is so dangerous that no First Amendment right to engage in it should be recognized.[225]

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[224] *See, e.g.*, SMOLLA, *supra* note 29, at 3-1 to 3-16.

[225] *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 714–48 (1971). Thus, even in particularized contexts where the government does have a more substantial interest in regulating speech to achieve other important objectives—such as the military, prisons, or schools—the Court has never said that the protections of the First Amendment are simply inapplicable. Instead, the Court has reviewed restrictions on First Amendment freedoms in these contexts under a more deferential standard of review that does require some showing of legitimate need by the government. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (observing that "aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment"); *see also* Thornburgh v. Abbott, 490 U.S. 401, 409 (1989) (prisons); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (schools). Of course, it might make sense to treat information gathering differently from speech in terms of declining to recognize the existence of a First Amendment right in the face of substantial competing interests if there were a sufficiently compelling reason to do so, such as a belief that the judiciary is less equipped to weigh the competing interests in the information-gathering context than it is in the speech context. See *infra* note 252 for a further discussion of this issue.

One could argue that the Court has allowed the government to discriminate on the basis of subject matter content in an area analogous to the information-gathering context. Under the Court's public forum precedents concerning a right of access to government-controlled fora for the purpose of engaging in expressive activities, when access is sought to a *non-public* forum the Court frequently allows the government to deny such access altogether (if such restrictions are reasonable), or to discriminate against putative speakers on the basis of the subject matter of their speech (but not the speakers' particular viewpoints). *See, e.g.*, Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 42–43 (1993). The principal justification for this treatment is that government simply could not function properly if it could not make reasonable subject matter distinctions on what types of speech would be allowed in certain government contexts and what would not. *See* SMOLLA, *supra* note 29, at 2-70.

Similarly, one could argue in the information-gathering context that the government should be able to generally deny access to non-public information, or to discriminate against putative information gatherers at least on the basis of the subject matter of the information at issue (like granting access to government courtrooms and documents while denying it to legislative and executive branch facilities and documents). Although this argument is not blithely dismissed, there are critical differences between the "access for speech" cases and the "access to information" cases in terms of promoting the First Amendment objectives of democratic deliberation and informed self-governance. While

So how did this divergent constitutional treatment of gathering government-controlled information versus other types of information come about? This divergence began with the Court's refusal to adopt a *Branzburg*-type balancing analysis in its decisions in *Pell-Saxbe* and *Houchins* to address a claimed right of newsgathering in the governmental context. It refused to do so for two principal reasons.

First, even though the *Pell-Saxbe* majority acknowledged that the Court in *Branzburg* had recognized that newsgathering activities were entitled to some measure of First Amendment protection, it proceeded to ignore this principle and instead relied on a dubious assertion that Justice White had made in his opinion for the Court in *Branzburg*.[226] In that case, citing primarily to *Zemel*, Justice White had asserted that "[i]t has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."[227] However, *Zemel* had absolutely nothing to do with the press or press rights,[228] and ironically, the restrictions on travel to Cuba at issue in that case expressly contemplated special rights of access to that country for the press.[229] So in a sense, this critical principle of *Pell-Saxbe* was built on a house of cards.[230]

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access to non-public forums—such as an event hosted by a public school or a military base—to express one's views might conceivably further those objectives in some situations, speakers denied such access will normally have alternative modes of getting their message out. The use of government property as a forum for speech purposes is typically not critical to maintaining a healthy flow of information to the public on important issues. The same cannot be said with respect to having access to information about the decisions and conduct of government officials that they have decided to withhold from the public, and especially where such withholding routinely occurs whether the nature of the information truly merits confidential treatment or not. *See infra* note 256. The First Amendment interests at stake in this context are simply too great to allow self-interested government officials to be the final arbiters of whether the public is entitled to important information about how those officials are executing their public trusts. *See infra* note 252 and accompanying text. While some may argue that leaks by government officials, or protections provided by government employee whistleblower statutes, are sufficient alternative modes of obtaining government information at least with respect to alleged misconduct, such uncertain and haphazard methods of achieving access to important government information seem plainly insufficient. Moreover, freedom of information laws enacted by the government in recent decades have also proved inadequate to address what one prominent commentator has referred to as the "problem of 'over-concealment' by mammoth, complex government." *See* Henkin, *infra* note 262 and accompanying text.

[226] *See supra* note 108 and accompanying text.

[227] *Branzburg*, 408 U.S. at 684.

[228] *See supra* notes 69–78 and accompanying text.

[229] In *Zemel*, the State Department had announced that it anticipated "granting exceptions to 'persons whose travel may be regarded as being in the best interests of the United States, such as *newsmen* or businessmen with previously established business

Second, as Justice Stewart put it for the Court in *Pell-Saxbe*, it was one thing to say that the government could not unduly interfere with newsgathering activities, but quite another to say that the government had an *affirmative* obligation to make available to the press sources of information not available to the public generally.[231] Here the Court seemed to be drawing a distinction between the use of the First Amendment as a sword, to compel the government to disclose or provide access to information, versus its use as a shield, presumably to ward off any undue interference with access to, or the collection of, information that would otherwise be freely available for the taking.

In *Houchins*, the Court continued to rely on the two foregoing principles as the main basis for its decision in that case.[232] But while these principles may appear plausible on their face, on closer examination they fail to withstand scrutiny as a basis for treating the gathering of information from the government differently than the gathering of information from other sources.

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interests.' " Zemel v. Rusk, 381 U.S. 1, 3 (1965) (quoting a State Department press release) (emphasis supplied). As additional support for his "no special access" proposition, Justice White in *Branzburg* cited to Justice Stewart's concurring opinion in *New York Times Co. v. United States*, 403 U.S. 713 (1971), which also had nothing to say about press newsgathering activities, or any special rights of access to information it might enjoy in this regard. *See New York Times Co.*, 403 U.S. at 727–30 (Stewart, J., concurring). However, two lower court opinions cited by Justice White did provide some support for this proposition even though those decisions themselves appeared to be founded on dubious authority. *See In re* United Press Ass'ns v. Valente, 123 N.E.2d 777, 778 (N.Y. 1954) (holding that the press had no First Amendment right to attend a court proceeding when the general public was excluded, but relying primarily on a prior New York Court of Appeals decision that did not directly address this issue); *see also* Tribune Review Publ'g Co. v. Thomas, 254 F.2d 883, 884–85 (3d Cir. 1958) (holding that the press had no First Amendment right to take photographs in and around courthouse in violation of court rules banning anyone from taking them, relying solely on *In re United Press Associations v. Valente* to support ruling). In any event, these two lower court opinions—which dealt primarily with a court's ability to control its own proceedings—hardly provided an adequate basis for Justice White's sweeping assertion that "it has generally been held" the press was not entitled to information that the government had withheld from the general public. *See also* Harvard Note, *supra* note 7, at 1507 n.14 (observing that none of the decisions relied on by Justice White "considered whether the constitutional gathering rights of the press and public are coextensive").

[230] Indeed, one commentator has suggested that the "no special access" principle fails to accurately describe the law on this issue in terms of what the lower courts have done. *See* Dyk, *supra* note 24, at 948 ("One apparent area of traditional press-only access involves scenes of crime, disasters, illegal demonstrations, and disorders. Despite the Supreme Court's dictum in Branzburg that '[n]ewsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded,' some lower court cases have recognized such a right.") (internal citations omitted).

[231] *See supra* note 109 and accompanying text.

[232] *See supra* notes 122–23 and accompanying text.

As to the press not being entitled to some rights of access to information above any right that might be enjoyed by the general public, this was not only a dubious statement of precedent, it was unsound as a simple matter of logic. As the Court recognized in *Branzburg*, newsgathering was entitled to "some" constitutional protection; if this did not mean that persons engaged in that function were entitled to some special protection for gaining access to information, then it is difficult to envision what this would otherwise mean. Gaining access to information sources is the essence of effective newsgathering, since the particular *method* of gathering information to which one has access is of less serious concern. For instance, if the government limited a journalist's access to a trial to being physically present and taking written notes (as the Supreme Court does in its own courtroom),[233] that journalist would still be able to report on her observations even if she is barred from using more effective electronic recording devices.[234]

Moreover, it would have been strange for the Court in *Branzburg* to have been referring to protection for methods of newsgathering versus access to information for two reasons: first, because that case itself involved alleged interference with access to news sources; and second, because in its decisions in *Estes* and *Nixon*,[235] the Court rejected any notion that a particular method or format for gathering the news was entitled to any constitutional protection at all. Indeed, those decisions rested on the rationale that no rights of the press were being infringed by not allowing it to gather the news via a television camera or tape recording, because the press otherwise had full access to the information it sought (albeit not in the preferred manner or format).[236]

Thus, if newsgathering is to enjoy some measure of constitutional protection, it would be mainly with respect to granting the press some special rights of access to information for the purpose of disseminating it to the general public. In this view, the press would enjoy some special access prerogatives not from an *institutional* perspective (i.e., not because the press *qua* press was entitled to special treatment), but rather from the *functional* perspective of operating as an

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[233] *See infra* note 234.

[234] This is not to suggest, however, that government restrictions on methods of information gathering are not of serious concern. *See, e.g.*, Akhil Reed Amar & Steven G. Calabresi, *The Supreme Court's Unfree Speech*, N.Y. TIMES, Oct. 5, 2002, at A19 (suggesting that the Court's policy allowing note-taking by the press in its courtroom but barring the general public from doing so violates the First Amendment, as well as its restrictions on the press's ability to at least provide the public with live radio broadcasts of Supreme Court arguments). My point is that restrictions on basic access to information are the *most* serious concern, for without such access debates about restrictions on particular methods of gathering information become moot.

[235] *See supra* notes 80 and 116

[236] *See supra* notes 80 and 116.

information-gathering agent of the public.[237] And this seems to be the very distinction that the Court in *Pell-Saxbe* and *Houchins* seemed unwilling to accept.[238] In other words, those opinions seemed to be based on the Court's reluctance to grant the press any special rights as a private institution, as opposed to the needs and interests of the *public* in obtaining access to certain governmental information through the press.[239] This institutional focus was demonstrated starkly by Justice Stewart, the author of *Pell* and *Saxbe*, in an article written in that period and cited by the Court in *Houchins*, where Justice Stewart argued that

> [T]he Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.... The primary purpose of the constitutional guarantee of a free press was... to create a fourth institution outside the Government as an additional check on the three official branches.... The relevant metaphor, I think, is the metaphor of the Fourth Estate.... It is this

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[237] This appears to be the view Justice Brennan had in mind when he argued in a speech that the First Amendment absolutely protected the right of the press to speak, and qualifiedly protected a "structural" or functional role for the press in gathering and disseminating information for the public. *See* Brennan, *supra* note 52, at 177 (Under the "structural" model of the First Amendment the press receives constitutional protection "when it performs all the myriad tasks necessary for it to gather and disseminate the news.").

[238] As Professor Lillian BeVier observed, Justice Stewart's "opaque assertion" in *Pell-Saxbe* that the government had no duty to grant the press special access rights "trivialized the issue in the case by failing to meet the argument that the denial of 'special access' to the press infringed the public's right to know," and "avoided direct confrontation with not only the basic premises of the press' claim, but also the implications of his own rhetorical affirmations [in his *Branzburg* dissent] of the first amendment's office in fulfilling the broad societal interest in a full and free flow of information to the public." *Informed Public*, *supra* note 24, at 490 (footnotes and quotations omitted). However, Professor BeVier ultimately concludes that the Court reached the right result in *Pell*, *Saxbe*, and *Houchins* because in her view the First Amendment cannot legitimately be read to support a "judicially enforceable right to know" government information on behalf of the public. *See id.* at 517. I will argue that Professor BeVier's cogent and insightful analysis was half right and half wrong: that while the First Amendment cannot be read to support a directly enforceable "right to know" by the public, this does not preclude a more limited and indirectly enforceable "right to know" through the mechanism ordained for that end by the First Amendment—i.e., the Press Clause. *See infra* Part IV. Professor C. Edwin Baker has forcefully argued, however, that while that clause should be read to provide the press with special *defensive* protection against government *interference* with its functional or "instrumental" role, he was "tentatively" not convinced that it should provide the press with *offensive* rights of access to government-controlled information. *See Press Rights*, *supra* note 28, at 840–45; *accord generally* O'Brien, *supra* note 24. These arguments will be taken up in more detail later. *See infra* notes 247–52 and accompanying text.

[239] *See also Justice Powell*, *supra* note 24, at 181–82.

> constitutional understanding, I think, that provides the unifying principle underlying the Supreme Court's recent decisions dealing with the organized press.... The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy [citing *Pell-Saxbe*]. The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act. The Constitution, in other words, establishes the contest, not its resolution.... [W]e must rely ... on the tug and pull of the political forces in American society.[240]

Hence Justice Stewart, at least, seemed to believe that the organized press was entitled to no special access to government information because it was an autonomous, constitutional co-equal with government, and that giving it any sort of special entitlement to that information would somehow upset this system of checks and balances. But not only did Justice Stewart fail to explain how giving the press some sort of special access to government information would cause constitutional harm,[241] his view seems entirely inconsistent with assertions by the Court in other contexts that the press was accorded special recognition in the First Amendment primarily due to its role in keeping the public informed about governmental affairs.[242] In this "functional" view, some constitutional protection for the press' access to government information would seem entirely appropriate. Moreover, such access rights would be "special" not because the press was somehow more constitutionally significant than ordinary members of the public, but rather because it fulfilled a *function* for the public that individuals members of the public generally did not perform themselves.[243]

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[240] Stewart, *supra* note 28, at 633–36.

[241] *See also Informed Public*, *supra* note 24, at 491 n.41 (observing that in Justice Stewart's speech there was "little analytical effort expended to explain what appears to be an inconsistency between what is described as a consciously chosen constitutional purpose to establish an institution to give 'organized, expert scrutiny of government' ... and what is asserted to be the absence 'from the Constitution [of] any guarantee that it will succeed' ") (quoting Stewart, *supra* note 28, at 634, 636).

[242] *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 219 (1966) ("The Constitution specifically selected the press ... to play an important role in the discussion of public affairs .... as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.").

[243] Some scholars have argued that such "special agency rights" would not come without costs to the agent, and thus would be unwise. In other words, if the press were to receive special constitutional treatment in its agency capacity, like most legal "agents" the press would also assume special legal obligations "as a fiduciary of the public interest" to report the information to which it received access accurately, fairly and completely. *See generally, e.g.*, Van Alstyne, *supra* note 28. But just because the

As to the second principle relied on in *Pell-Saxbe* and *Houchins*, that compelled access to, or disclosure of, information is of a different constitutional magnitude than preventing undue governmental interference with gaining access to or gathering otherwise available news (such as events in Cuba or criminal sources that would be willing to talk but for compelled grand jury testimony), the Court never undertook in either decision to explain why this was so. In other words, the Court relied on *ipse dixit*—if you cannot explain it, just assert it. One statement by the plurality in *Houchins* does provide a clue, however: "There is an undoubted right to gather news from any source by means within the law, . . . but that affords no basis for the claim that the First Amendment compels others—private persons or governments—to supply information."[244] Certainly this must be true as a general rule with respect to using the First Amendment to compel disclosures of information from unwilling private individuals. For one thing, it is difficult to see how the *government* would be "abridging" or interfering with anything under such a scenario, and thus the requisite state action to invoke any sort of First Amendment right would appear to be missing.[245] But even absent this state action problem, the countervailing privacy or property interests—interests of a constitutional magnitude were the government to interfere with them—would surely counsel against a First Amendment right of the press or any other private parties to compel private individuals to supply them with information.[246]

Constitution grants certain special protections, it does not seem to necessarily follow that special obligations would be the inevitable consequence of those rights. But even if they were, it does not seem out of the question that the press might be held responsible in some ways for accurately and fairly reporting information to which it gained special constitutional access (at least to the extent of making it liable for any materially false or misleading assertions, and subject perhaps to some sort of *New York Times* actual malice limitations, see *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which would leave it sufficient breathing rooms to exercise its editorial discretion). However, any detailed consideration of these complex issues is beyond the scope of this Article.

[244] *Houchins*, 438 U.S. at 11.

[245] *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991) (asserting that without the requisite " 'state action' . . . the First Amendment has no bearing"); *see also* Harvard Note, *supra* note 7, at 1513–14. Somewhat ironically, however, were a journalist to engage in "self-help" in gathering information from an unwilling private party and be sued by that party for "violating" an applicable law such as a tort, contract or property law, for example, there would be sufficient state action to raise the First Amendment as a "shield" to that action. *See Cohen*, 501 U.S. at 668 ("Our cases teach that the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action'. . . ."). For a discussion of a right to gather information in the context of such "self-help" measures used against unwilling private sources of information, see *infra* notes 284–302 and accompanying text.

[246] *Cf.* Emerson, *supra* note 26, at 19 ("The Constitution, of course, does not obligate any private person, that is, non-government person, to disclose information to any other private person."). One might debate, however, to what extent these rationales

But to equate the government's right to withhold information from the public to that of private individuals, as Chief Justice Burger did in *Houchins*, seems way off the mark. This turns the principle that government exists to serve the people on its head.[247] As the dissenting Justices in *Pell-Saxbe* and *Houchins*

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should apply to "non-individual private persons" such as a corporation which is driven primarily by property considerations rather than privacy concerns, particularly when such "persons" have become major centers of power in our society with the ability to profoundly affect the public interest (and also "exist" under grant of right from the government, thus perhaps providing an argument to overcome "state action" problems). *See, e.g.*, Editorial, *An International Right to Know*, N.Y. TIMES, Jan. 25, 2003, at A18 (arguing that multinational companies should have a duty to disclose chemical emissions and other environmental risks that they pose abroad in the same manner as disclosure is required in the U.S.); Editorial, *Our Money, Our Votes*, WASH. POST, Jan. 21, 2003, at A16 (describing the opposition of mutual fund companies to proposed regulations requiring them to disclose how they vote shares of companies technically owned by their individual investors); Katie Hafner & John Biggs, *In Net Attacks, Defining the Right to Know*, N.Y TIMES, Jan. 30, 2003, at G1 (describing calls for a public right to know about breaches of a company's computer network that may compromise the safety of consumer financial and other personal data). Of course, one obvious response to a right to gather information from businesses would be that if government (through its regulatory powers) will not act to compel disclosure of information affecting the public interest, why should a private party like the press have that right? In other words, if the public wants information from private entities, it should go through the democratic process in order to obtain the information rather than relying on a judicially-enforced constitutional right that is exercised by its "agents." One possible response to this argument might be that if one of the primary purposes of the First Amendment is to provide the public with sufficient information to allow it to exercise its "democratic franchise," then an "institutional failure" of government to represent the public interest in this regard might provide a sufficient basis for constitutional action. *Cf.*, *e.g.*, Sunstein, *supra* note 24, at 891–92, 920 ("societal" view of First Amendment seeks to protect against self-interested behavior by politicians and "control of government by powerful private groups"). Also, if as many scholars urge, the First Amendment should be read to afford investigative journalists protection against subsequent legal sanctions for engaging in "self-help" in acquiring information to report on important public matters, *see infra* notes 293–301 and accompanying text, is it not more desirable to force such investigators to go through the "front door" by openly demanding such information through legal process, rather than incenting them to engage in surreptitious "back door" newsgathering activities? Obviously, any detailed consideration of these complex issues is beyond the scope of this Article.

[247] As James Madison, the principal drafter of the Constitution, said long ago: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 4 ANNALS OF CONGRESS 934 (1794). This point was critical to the dissenting Justices in *Pell* and *Saxbe*. *See Saxbe*, 417 U.S. at 872 (Powell, J., dissenting) (right to information from government was the "right of the public to the information needed to assert ultimate control over the political process"); *id.* at 839–40 (Douglas, J., dissenting) (right was one "of the people, the true sovereign under our constitutional scheme, to govern in an informed manner").

acknowledged, there is no question that the government has an interest in blocking public access to some information that needs to be kept secure or confidential for legitimate reasons.[248] But these areas of sensitivity should be the exception and not the rule.[249] In a democratic system the government consists of the representatives of the people, and beyond these areas of legitimate need the government has no business in treating its affairs as if they were proprietary matters.[250] The presumption should be one of public availability and access to government information, and not the other way around.[251] Given the difficulties of asserting the contrary proposition, it is no wonder that the majorities in *Pell-Saxbe* and *Houchins* never sought to justify their statements in this regard. As the

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[248] Indeed, Professor Louis Henkin has asserted, rightfully in my view, that the government has a duty to withhold some information from the public that, if generally disclosed, would be likely to cause harm to the public interest. *See* Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 273–76 (1971).

[249] *See, e.g.*, Emerson, *supra* note 26, at 16–17 (arguing that the "starting point" for a right to know should be the right of the citizen as ultimate sovereign to all government information, with exceptions "scrupulously limited to those that are absolutely essential to the effective operation of government institutions").

[250] *See, e.g.*, Sunstein, *supra* note 24, at 917–18 (arguing that justifying government restrictions on the speech of its employees by "analogy to private ownership of information . . . breaks down because the arguments that support such ownership are inapplicable to government. The first amendment question should therefore turn not on notions of information ownership, but on what sort of justification the government is able to use to support the restriction"); *see also id.* at 921 ("[T]he notion that some information is 'owned' by the government is unacceptable. . . . [T]he notion of a governmental 'property interest' in information should, at least for most purposes, be rejected.").

[251] By this statement I do not mean to suggest, however, that this conceptual ideal should not be limited by practical considerations. For instance, I agree with Justice Stewart's assertion that the Constitution should not be a Freedom of Information Act, in the sense that it would simply be unworkable to allow any citizen denied access to government information to bring a constitutional action to compel access to it. Otherwise, such a situation would certainly risk trivializing constitutional rights, as well as place an inordinate burden on the government to administer and comply with such a right. The challenge is to give meaning to this ideal, while recognizing legitimate interests of government in withholding certain information and avoiding undue burdens of administration and compliance. First Amendment scholar Vincent Blasi seemed to recognize this tension between the ideal and the practicalities when he concluded that a public right to obtain access to at least *some* measure of government information is a "core commitment of the first amendment." *See* Blasi, *supra* note 24, at 492, 493 ("It would be anomalous for a constitutional regime founded on the principle of limited government not to impose *some fundamental restrictions* on the power of officials to keep citizens ignorant of how the authority of the state is being exercised.") (emphasis supplied). In Part IV of this Article, I will propose a First Amendment right to gather information that I believe best accommodates these competing interests.

dissenters in *Houchins* pointed out, what possible basis did the public servant in that case (i.e., the local sheriff) have for telling the public it had no business knowing in what condition he was maintaining the public jail facilities?[252]

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[252] As described earlier, see *supra* notes 120–27 and accompanying text, in addition to the primary "no special press access" and "no compelled disclosure" rationales for refusing to recognize a press right of access to government information relied on by the plurality in *Houchins*, it also provided some other reasons for refusing to recognizing such a right. Of these, certainly the most compelling one is the questionable competence of the judiciary to weigh—under a myriad number of different scenarios—the asserted public interest in receiving particular information against the public interest asserted by the government in withholding it. Directly related to this issue is the difficulty of creating workable standards that the judiciary could use to decide such disputes, and the fact that such decisions often involve policy judgments more suitable for the political branches of government. This nettlesome problem has been a substantial factor in leading a number of scholars, who otherwise see great merit in a First Amendment right of access to government information, to ultimately conclude that such a right should not be recognized.

For instance, in a 1986 article Professor Cass Sunstein concluded that an "equilibrium theory" proposed by certain scholars, under which a lack of a government obligation to *disclose* information is supposedly offset by the press' right to *publish* almost all lawfully-obtained information to produce an ideal accommodation between the need for government secrecy and the public's need for information, is unlikely to achieve either objective. *See* Sunstein, *supra* note 24, at 890, 920–21. Accordingly, he appeared to suggest that a form of contextualized "interest-balancing" should be undertaken by the courts to accommodate these interests. *See id.* at 904, 921. However, Professor Sunstein later seems to have concluded that the difficulties inherent in such judicial balancing counsel against the recognition of rights of access to government information. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 106–07 (1995); *see also* Baker, *supra* note 28, at 841–45, 857 (while arguments for "offensive" rights of access to government information have "considerable force," tentative conclusion is that the press is only entitled to "defensive" rights against governmental interference with newsgathering and reporting functions due in significant part to problems inherent in the judicial administration of a right of access); *see also* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 225–49 (1989); *cf. generally Informed Public*, *supra* note 24 (rejecting general "right to know" government information not only because of difficulties with judicial administration, but also based on representative structure of our democracy). On the other hand, other scholars have proposed various solutions to the difficulties associated with a judicially-enforced right of access. Probably the most popular one is some version of the right of access recognized by the Court in *Richmond Newspapers* and progeny, essentially prohibiting the government from denying access to information that has traditionally been open to the public. *See, e.g.*, Blasi, *supra* note 24, at 493; Dyk, *supra* note 24, at 930 (arguing for press access rights based on traditional openness standard, as well as where the government has granted access discriminatorily or in an arbitrary manner); *cf.* Anderson, *supra* note 1, at 523 (observing that the special constitutional rights of press access ought to be recognized only during extreme constitutional crises involving government secrecy); Cheh, *supra* note 24, at 698, 730–31 (urging stronger free speech rights for government employees to combat secrecy, as well as right of access limited to policing "official policies or processes of concealment" of

government information, and a "due process" based right of access to government institutions).

Certainly the issue of workable judicial standards to administer a constitutional right of access to government information (including government proceedings and institutions)—where a court is being asked to balance competing public interests—is a difficult and close one. But this difficulty inheres in any attempt to provide some measure of First Amendment protection to information gathering based on the public's interest in receiving certain information to intelligently exercise its democratic franchise, such as in the area of newsgathering. To a large extent the Court has already demonstrated that such balancing, including the creation of some form of workable standards, can be done—first in *Branzburg*, and more particularly in the *Richmond Newspapers* line of cases. The option of leaving the public's right to government information *completely* in the hands of the government representatives and officials whose performance the public must assess, seems unwise and perhaps ultimately destructive of the democratic process. *See, e.g.*, Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002) ("Democracies die behind closed doors."); Brennan, *supra* note 52, at 182 ("I believe that the Framers . . . had in mind the truth precisely captured several generations later by Lord Acton: 'Everything secret degenerates, even the administration of justice.'"). This is not to say, however, that there is no good reason to treat affirmative rights of access to government information differently than more defensive rights of preventing undue government interference with information-gathering activities. At least in cases where such interference has been alleged, the conflict has been sharpened and particularized as to the information desired and the competing interests at stake. In the case of demands for access to government information, the challenge is more to prevent "fishing expeditions" for information that the government may or may not have in its possession, placing unmanageable burdens on government to both respond to such requests and manage them from a judicial perspective (i.e., preventing the Constitution from becoming a Freedom of Information Act). In Part IV, I will propose special limitations on a right to gather information from the government that I believe may help to alleviate these concerns while still preserving a meaningful judicial check on flows of government information to the public. *See infra* note 341.

As indicated above, Professor Lillian BeVier has also argued against a right to know government information based on the representative nature of our democracy. In her view, "[s]ince the Constitution does not establish a direct democracy, the inference of a right to know cannot find its constitutional source in the view of popular sovereignty which contemplates direct citizen participation in the making and administration of laws." *Informed Public*, *supra* note 24, at 506. A short answer to this argument is that whether or not the Framers of the Constitution contemplated a "direct" democracy or an "indirect" one through the offices of our representatives, in order to have democratic self-government at all, citizens must still have access to information vital to choosing, and assessing the performance of, representatives that undertake the day-to-day operations of our government. Indeed, Professor BeVier appears to concede as much. *See id.* at 505–06 ("The Constitution envisions . . . a system in which the citizens do not directly either make or implement public decisions, though through their power to elect their representatives they retain their authority to choose the direction of governmental policy."). If citizens do not have sufficient information to understand the decisions and policies their representatives are adopting and implementing, how can they retain their authority to determine what those policies will be? Moreover, the representative democracy argument appears to ignore the problems of self-interested representation and

Hence, the Court's principal justifications for applying different standards of First Amendment protection to the gathering of news from governmental versus non-governmental sources—and especially where newsgathering from governmental sources is generally disfavored—are unsupportable both from the perspective of general First Amendment law and as a matter of policy. But as noted above, in the one category of government information for which the Court subsequently did recognize a First Amendment right of access—i.e., to criminal judicial proceedings—it did so on grounds that were much broader than those relied on by the Court in *Branzburg* for according some protection to the gathering of news from non-governmental sources. Thus, like the Court's treatment of information gathering from governmental versus non-governmental sources generally, it is important to inquire whether this differential treatment can be justified as a matter of law and policy.

2. *Justification for a Public Right to Gather Information About Criminal Trials Versus the Justification for General Newsgathering Protection*

As discussed earlier, in *Richmond Newspapers* and its progeny the Court created a *public* right of access to criminal judicial proceedings under the First Amendment on the theory that one of the core purposes of that Amendment is to ensure an informed discussion of governmental affairs. It was thought that such an informed discussion is necessary in order for citizens to effectively participate in our scheme of self-governance. Thus the Court held that any restrictions by the government on this relatively specific right are subject to a form of heightened scrutiny, as opposed to the milder balancing approach for governmental impingements on the press' newsgathering functions the Court utilized in *Branzburg*.[253]

Assuming that, as argued above, the gathering of news from government sources should, at the least, receive similar First Amendment protection as the gathering of news from other sources, one must then inquire whether that Amendment provides a basis for providing the *general public*, including the press, with *greater* constitutional protection for acquiring information about a specific segment of government affairs than provided to newsgathering activities generally. Preliminarily, however, one might question just how much protection for access to government information is being provided by a right that depends on a history or tradition of public access in the first place.

Despite Justice Brennan's good intentions of coming up with "helpful principles" for limiting the "theoretically endless" reach of the right to gather information about government affairs, a right of access based on a historic

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undue influence by private factions that Professor Sunstein has argued were some of the main problems that the First Amendment was designed to address. *See infra* note 307.

[253] *See supra* notes 166–70 and accompanying text.

tradition of government openness is a fairly limited step towards the goal of keeping the public informed about those affairs.[254] Although it might prevent idiosyncratic or irregular decisions to deny the public access to information that the government had otherwise made routinely available,[255] for the most part this is akin to the government taking the position that the public is only entitled to receive information about public business that the government had decided sometime in the past to make available to it. Giving government representatives the sole authority to decide what information the public will receive to assess their performance would not appear to be a very wise policy.[256] Moreover, a standard based on historic practices appears to freeze the government's obligations of openness in the past. Considering the government's ever-changing and evolving functions, such a standard would likely close the public out from access to information about more modern initiatives that might be every bit as important for the public to know about as traditional government activities.[257]

Thus, it is questionable whether such a right of access would operate to provide citizens with sufficient information to make informed decisions about

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[254] *Cf.* Sunstein, *supra* note 24, at 899 (describing *Richmond Newspapers*' "right of access to judicial proceedings" as a "quite narrow" exception to general rejection of right of access to government information).

[255] *Cf. generally* Dyk, *supra* note 24.

[256] *See supra* note 252; *see also* C. Edwin Baker, *The Media that Citizens Need*, 147 U. PA. L. REV. 317, 402 (1998) ("[B]ureaucratic bodies instinctually seem to desire secrecy. . . . Information could expose their misbehavior, failures or incompetence."); Cheh, *supra* note 24, at 693 ("Allowing the executive branch a virtual free hand to withhold information is not . . . cost free. It invites excessive secrecy and abuse of power."); Henkin, *supra* note 248, at 275–76 ("Without any doubt . . . Government frequently withholds more and for longer than it has to. Officials, of course, tend to resolve doubts in favor of non-disclosure. Some concealment is improperly motivated—to cover up mistakes, to promote private or partisan interests, even to deceive another branch . . . of government, or the electorate."); Mark Tapscott, *Too Many Secrets*, WASH. POST, Nov. 20, 2002, at A25 ("Why does the White House sometimes seem so determined to close the door on the people's right to know what their government is doing? Even some of us who admire the leadership of President Bush in the war on terrorism would like to know."). For an extreme example of these problems, see Elizabeth Mehren, *'Insanity' in Nixon's White House*, L.A. TIMES, Feb. 18, 2003, at A11 (describing alleged proposal of Nixon White House official to firebomb a Washington think tank that had been critical of the Nixon Administration).

[257] *See, e.g.*, Editorial, *Total Information Awareness*, WASH. POST, Nov. 16, 2002, at A20 (decrying lack of public information about new Pentagon project to amass and screen data about American citizens for purpose of fighting terrorism). This highlights another problem with Justice Brennan's "experience and logic" approach: it bears scant relationship to the First Amendment value of information that impels the recognition of a right of access in the first place—i.e., for its importance in keeping the public informed about significant government policies, actions, or decisions. *See, e.g.*, *Mackerel in Moonlight*, *supra* note 24, at 336–38.

their government. And this problem is obviously exacerbated by the fact that this right is currently limited to the judicial branch of government (at least as it has been defined by the Supreme Court), and does not apply to the more political branches where citizens are called on to make frequent, periodic decisions about whether their representatives are doing an adequate job of operating the government. Many people opposed to (or in doubt about) a greater constitutional right of access, however, point out that the federal and state governments have in recent times enacted freedom of information and related laws designed to make government actions more transparent to the public.[258] But many of these laws do not even apply to important operations of government,[259] and to the extent they do it is frequently and persuasively contended that they are subject to such broad exemptions[260] and government resistance in complying with them[261] that their stated goal of open governance has been substantially diminished.[262] In sum, the

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[258] For a good overview of the federal Freedom of Information Act (FOIA) and related government openness laws, see DIENES ET AL., *supra* note 98, at 357–518.

[259] For instance, the most important of these laws—the federal FOIA—only applies to the records of executive branch agencies and excludes "[m]any governmental organizations . . . most notably Congress, the courts. . . . the President . . . and those whose sole function is to advise and assist the President." *See id.* at 421–22 (footnotes omitted).

[260] The federal FOIA contains nine broad exemptions, *see id.* at 426–53, the most important of which relate to matters of national security and law enforcement. These exemptions are notorious for permitting the government to withhold much important information at its discretion. *See, e.g.*, Cheh, *supra* note 24, at 690–91 ("Because the executive branch both establishes the criteria for classification and performs the actual classification of such information, the FOIA national security exception is not so much an exemption as it is a license to withhold.") (footnotes omitted); Dyk, *supra* note 24, at 937 ("FOIA . . . contains exemptions enabling the government to withhold evidence of abuse. Even if the information is not withheld altogether, the Act allows the government to substantially delay its release.").

[261] *See, e.g.*, HERBERT N. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW 71 (1999) ("It has been virtually a matter of principle for American presidents to oppose the Freedom of Information Act . . . ."); *id.* at 76 ("Though the FOIA staff in federal agencies have generally embraced the letter and spirit of the FOIA, full compliance with the act is frustrated by underfunding and, in some agencies, by clear hostility at the policy level."); *id.* at 180 ("In recent years, the courts have suggested ways for Congress to repair glaring FOIA loopholes, but, despite several opportunities . . . Congress has turned its back on the FOIA."); *see also* Adam Clymer, *Government Openness at Issue as Bush Holds Onto Records*, N.Y. TIMES, Jan. 3, 2003, at A1 (describing new directive from U.S. Attorney General encouraging "federal agencies to reject requests for documents if there was any legal basis to do so, promising that the Justice Department would defend them in court").

[262] Indeed, the situation today appears to be little different than it was in 1971 when Professor Henkin observed that statutes such as FOIA "do not begin to reach the problem of 'over-concealment' by mammoth, complex government." Henkin, *supra* note 248, at 276; *see also generally* ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION

Richmond Newspapers right of access seems woefully inadequate for achieving its stated goals.

Be that as it may, however, from a policy perspective it does appear to be a movement by the Court in the right direction in terms of recognizing the public's entitlement to information about its government that there is no legitimate reason to withhold. The real question is whether such a right of access can be justified from a legal perspective, and particularly based on the First Amendment's protection of "speech" or "press."[263] The right of the press recognized in *Branzburg* to some protection for newsgathering activities would seem to be reasonably included within the proscription that the government shall not abridge the "freedom of the press." If one believes that the "press" intended by the Framers is the institutional or organized press, as did Justice Stewart, then it seems reasonable to think that the entire "press" process or function of gathering, editing, and publishing the news should be entitled to some protection under this clause. But even if one believes, as most members of the Court seem to think, that the principal purpose of the Press Clause is to protect the right of *anyone* to *publish* information or ideas, it would still not be unreasonable to take the position that "anyone" at least includes the institutional press, and that when it comes to publishing news some protection is warranted for the process by which news is acquired.

However, by the time the Court was faced with the press' claim in *Gannett Co.* that it was entitled to attend and report on a pre-trial hearing in a criminal case, the Court had recently expounded the principle in *Pell-Saxbe* and *Houchins* that the press had no First Amendment right of access to government information

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AGE (Charles N. Davis & Sigman L. Splichal eds., 2000). It should be noted that courts of this country have recognized a general common law right "to inspect and copy public records and documents." Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978). However, this right is fairly limited in that it mainly applies to judicial records (where courts find a *Richmond Newspapers* right of access based on the First Amendment anyway), and has largely been supplanted with respect to other records of government by state FOIA-type laws. *See* DIENES ET AL., *supra* note 98, at 179–86, 483–84.

263 Without purporting to enter the extensive debate on the legitimacy of different methods of constitutional interpretation, for purposes of this Article I will assume that implied constitutional rights—like a right to gather information—should at least be "fairly inferable" from the textual provisions of the Constitution. *See, e.g.*, Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1193–94 (1987) (contending that arguments from text are the most important mode of constitutional interpretation when various modes are in conflict); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) (arguing that constitutional rights should be derived from the history and text of the First Amendment, and their "fair implications"); *see also Informed Public*, *supra* note 24, at 499–500; *cf.*, *e.g.*, Cheh, *supra* note 24, at 722 (noting that the argument that the "first amendment cannot legitimately be read to provide . . . a right [of access]. . . . proceeds from a narrow, interpretivist reading of the constitution").

for newsgathering purposes. And since in *Gannett* the Court rejected the press' claim that the *public* had a right to attend the hearing under the *Sixth* Amendment, the only reasonable alternative left for those Justices who thought the public did have a right to be informed about what took place in criminal trials was the First Amendment. In other words, the Court's sweeping rejection in *Pell-Saxbe* and *Houchins* of a right of the press to gather government information for the public, fairly boxed it in when considering the claims of the press in *Gannett* and *Richmond Newspapers* as to a right to report on criminal judicial proceedings. Thus, the Court essentially had no choice in the latter cases but to make it a *public* right of access versus one based on a newsgathering right under the Press Clause of the First Amendment.

But a public right of access, as opposed to one based on the newsgathering functions of the press, is much more difficult to support as conduct protected by the First Amendment. Both are forms of non-expressive conduct that would normally fall outside the scope of First Amendment protection, but as discussed above, the gathering of news about government proceedings is a necessary antecedent of publishing news about them. In other words, the press seeks access to government proceedings for the purpose of engaging in an activity expressly protected by the First Amendment.

The connection between a general public right of access, however, and acts of speaking or publishing, is much more tenuous. Although the Court in *Globe Newspapers* justified the protection of such conduct as being necessary for an informed discussion of governmental affairs, it seems almost "fairy taleish" to presume that all, or even most, individual members of the public seeking access to a criminal trial are doing so for the purpose of thereafter engaging in a debate about how best to reform the criminal justice system (or some such thing having to do with governmental decision-making). A more realistic presumption about why individuals attend criminal trials would be that they have personal ties to the victim or accused, or they are drawn to attend by the notoriety of the alleged crimes or persons involved. Thus it is probably fair to say that most members of the public are likely to seek access to a criminal trial for reasons having nothing to do with engaging in speech about issues of governance.

Accordingly, while basing a First Amendment right of access on the Press Clause can be reasonably grounded in the language of that Amendment, basing it on the Speech Clause seems much more problematic. What the Court really appeared to be doing in these cases, while purporting to rely on an "informed speech" rationale, was accepting the thesis expressed by Justice Powell in his *Pell-Saxbe* dissent that people simply have a basic right "to a free flow of information and ideas on the conduct of their Government."[264] In other words, under the "societal function" of the First Amendment, the people have a basic *right to know* about what goes on in certain government proceedings without

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[264] *Saxbe*, 417 U.S. at 864 (Powell, J., dissenting).

having to demonstrate a "speech" purpose for invoking a right of access to them.[265] But discerning the Court's exact justification in this regard is not essential, since predicating a constitutional right of access on a generalized presumption that informed speech will result is in substance no different than predicating it on a general right to know. In either case, individual citizens are entitled to invoke this right of access regardless of whether or not they have a true "speech" motivation for doing so.

Despite the ubiquity of rhetoric in much legal commentary extolling a public "right to know" under the First Amendment that even some Justices have used from time to time,[266] basing a right of access on such grounds (or on a generalized speech presumption if you will) seems troubling for several reasons. Preliminarily, such a justification seems in conflict with the Court's rejection of a public right to access or gather information in *Zemel*—thus creating additional doctrinal inconsistencies. More importantly, such a reading transforms the First Amendment into an entirely different form of constitutional right than was originally intended. And finally such a right is simply unmanageable from a constitutional perspective, and for that reason ends up becoming regarded as something of an anomaly in derogation of the broader First Amendment interests which sparked its recognition in the first place. These problems will be addressed in turn.

In *Zemel*, the Court held that a governmental restriction on an individual's freedom of action that constrains his ability to become informed about the impact of government policies does not implicate First Amendment concerns. But from the perspective of such a "speech-action" distinction, it is difficult to see how a ban on travel to Cuba is any different than a ban on "travel" into a courtroom. Both are restrictions on movement (or "inhibitions of action," as the Court said in *Zemel*) allegedly engaged in for the purpose of acquiring information concerning governmental activities, or the impact of them. In addition, it would be hard to contend that the way in which a government operates its criminal justice system is of any greater concern from a democratic-decisionmaking point of view than the impact of its foreign policy. Thus, as to a right of the general public to gain access to important information for First Amendment purposes, *Zemel* is in substantial tension with the right of access recognized in *Richmond Newspapers*.[267]

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[265] *See id.* at 872 (asserting that "[g]overnmental regulations should not be policed in the name of a 'right to know' unless they significantly affect the societal function of the First Amendment"). Again it is interesting to note that Justice Brennan's original application of the "structural" or "societal" model of the First Amendment seemed to be limited to the Press Clause, even though he did join Justice Powell's dissent in *Pell-Saxbe*. *See* Brennan, *supra* note 52.

[266] *See supra* notes 76 and 265.

[267] One might argue, however, that a right of access is more appropriate where judges in particular cases have taken *targeted* action to restrict flows of information from the courtroom (where such restrictions are in some sense content-based, at least as to the

More significantly, reading the freedom of "speech" and "press" protected by the First Amendment to essentially protect a "freedom to know" radically alters the activities protected by that Amendment. Such a reading appears to confuse *means* with *ends*. While the acquisition of information and progress of knowledge are certainly important goals of freedom of expression, they are just that—goals. The means chosen by the Framers for achieving those objectives consist of expressive activities and, by reasonable implication, other non-expressive conduct necessary to engage in meaningful expression. In protecting the right of the public to "know" certain information *both as a means and an end*, it becomes well nigh impossible to place any meaningful boundaries on that right. This problem forces judges to resort to "helpful principles" like "experience and logic" in an attempt to establish such boundaries or limitations, which often render the right relatively insignificant in promoting the general goal of an informed and knowledgeable citizenry.

Even if a "right to know" could be fairly implied from the freedoms of speech and press, the wide array of conduct or activities one might justify under such a right, and its potential for conflict with other societal interests, might counsel against its recognition. Trying to define manageable boundaries of a right to engage in information-gathering activities for the purpose of engaging in meaningful expression presents enormous challenges of its own.[268] However, with an activity like newsgathering and our society's experience with what that activity involves, we at least have some sense of the relative costs and benefits associated with assigning a certain level of constitutional protection to it. The same cannot be said of a general right to know that could be used to justify constitutional protection for a virtually limitless universe of conduct pursued in the name of information or knowledge.[269] Thus the potential societal costs and

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general subject matter of the information), as opposed to the government incidentally burdening the flow of information with *general* travel bans (that are plainly content neutral). But under traditional First Amendment speech principles, such a distinction in the character of the government restriction would typically be more relevant to the consequent level of constitutional scrutiny (including a decision *not* to apply any scrutiny in a given case, such as in *Cohen*) than the existence of the First Amendment right in the first place. *See infra* note 293.

[268] *See infra* Part IV.

[269] Of course there are those that would argue that a "right to know" should be confined to the meaning traditionally ascribed to it—that is, the public's right to know information about its own government (hence giving members of the public a special "right" to that particular information). *See, e.g.*, *Informed Public*, *supra* note 24, at 484 n.10 ("[T]he term 'right to know' denotes a personal right held by every member of the public to have access to information controlled by the government."). There are many problems with this position, however, of which I will highlight only a few. First, there is no basis for limiting a First Amendment right to "know" only this type of information. Logically a "right to know" would encompass any information or expression within the scope of First Amendment protection. But even if one derived a narrower "right to know

"injury to other social goals"[270] that would likely attend the recognition of such a right seem prohibitive.

These last points are related to my final criticism of a right to know. Once such a broad, unmanageable right is created, the Court will likely be reluctant to extend its application to other contexts where the public does have a legitimate interest in obtaining certain information. This seems to be the case with the right of access to criminal proceedings recognized in *Richmond Newspapers* and its progeny, where the Court spoke only of its application to criminal proceedings even though from an "experience and logic" perspective it would seem to apply equally to civil trials.[271] Moreover, even though a delineation of the boundaries between the *Houchins* rule of no access to government information, and the *Richmond Newspapers* exception to that rule, has been a matter of active litigation in the lower courts since the early 1980s through the present time,[272] the Court has not taken a case outside of the criminal trial context to clarify these issues. In other words, the public right of access created in *Richmond Newspapers* has been relatively dormant at the Supreme Court level. Although it is impossible to determine precisely why this has been, one reason may be the daunting task of determining the scope of such a right. And this may be particularly true of claimed rights of access to government information that are not so easily resolved by reference to principles like "experience and logic," which proved to be especially suitable for assessing such a right in the context of historically open criminal trials.[273]

In sum, while I have argued that the *Houchins* rule of no access to government information is unsupportable at least as part of a body of law that recognizes some protection for the gathering of information from non-government sources, I have contended that the broad public right to know recognized in *Richmond Newspapers* is similarly unsupportable. What is needed is a workable standard somewhere in the middle that bridges these extreme ends of the spectrum, which accords some right of access and protection for

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government information" from a "structural" reading of the First Amendment, such a right would presumably give any citizen a directly enforceable right to obtain government information and would effectively convert the Constitution to a Freedom of Information Act. Such a right would be both unmanageable and unworkable. *See supra* note 252.

[270] *See supra* note 49.

[271] Indeed, many lower courts have so applied that right. *See supra* note 214 and accompanying text.

[272] *See supra* notes 213-15.

[273] *See also* Cheh, *supra* note 24, at 728. Indeed, as I mentioned at the beginning of this Article, despite the fact that a split of opinion among the U.S. Courts of Appeal is one of the most important and frequent reasons that the Court will decide to hear a particular appeal, it recently declined to resolve a split that has emerged among those courts as to whether the *Richmond Newspapers* right of access applies to deportation hearings conducted by the government. *See supra* note 19.

information-gathering activities to a manageable subset of our society that the general public relies on to gather and disseminate important information to it. In other words, by focusing on the recognized *functions* that certain groups perform for society, instead of on the perceived inequities in allowing some groups to invoke constitutional rights not available to individual citizens, a workable right to gather information that is not "theoretically endless" can be fashioned. But before I elaborate on this further, having explored the Court's information-gathering jurisprudence in the context of governmental information, it remains to evaluate it with respect to information gathered from other sources.

B. *Information Gathering with Respect to Non-Governmental Sources*

This section will explore the implications of the Court's jurisprudence for the gathering of information that is in the public domain or under the control of non-governmental parties. I will first examine the different messages that the Court sent in *Zemel* and *Branzburg*, and then undertake a similar analysis with respect to *Branzburg* and *Cohen*.

1. *Scope of Protection for Information Gathering From Non-Governmental Sources*

Read together, *Zemel* and *Branzburg* could be viewed as establishing a general principle that information gathering is not protected by the First Amendment except in the limited area of gathering and reporting the "news." Indeed, some lower courts appear to have interpreted these decisions in this way.[274] However, such a principle appears to be more a product of the "common law manner" of deciding constitutional issues on a case-by-case basis than any conscious intent by the Court. This is because any such principle would be largely unsupportable under general First Amendment principles that have traditionally guided the Court.

First of all, granting some protection to gathering information about "news" or recent events, but not with respect to conditions that have historically prevailed in Cuba, for example, would again appear to be in substantial tension with a cardinal rule of First Amendment law that the government generally is restricted from regulating conduct associated with speech on the basis of the content or subject matter of the speech at issue.[275] Moreover, as the Court itself recognized in *Branzburg*, "freedom of the press" has not been traditionally viewed as being limited to the right of the institutional press to report on the news. As the Court explained in the context of declining to create a specific testimonial privilege for journalists:

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[274] *See supra* note 216–18 and accompanying text.

[275] *See supra* notes 223–25 and accompanying text.

> Freedom of the press is a fundamental personal right which is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. . . . The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists.[276]

Thus, from a First Amendment perspective, the "press" encompasses publishers of all sorts, that publish all kinds of "information and opinions." While it might be possible to confine First Amendment protection for information gathering to those who published "news" (provided an acceptable definition of that term could be agreed upon), such a result would seem to be at odds with the "public informing" purpose of that Amendment recognized by the Court in *Globe Newspapers* and other cases. Surely, the published findings of a private research group that has conducted a study of government environmental policy, or the published results of a social scientist's study on an issue like crime or drugs, can provide the public with information that is just as important to decisions about self-governance as that obtained from newspapers or the nightly news.[277]

Accordingly, if a First Amendment principle that protected the gathering of news but not other sorts of important information would be largely indefensible, one must account for the seeming inconsistency between *Zemel* and *Branzburg* in other ways. In other words, what caused the Court to view Mr. Zemel's desire to travel to Cuba for the purpose of acquiring information about affairs there, as being less worthy from a First Amendment perspective than the desire of the reporters in *Branzburg* to acquire information from their informants in an unimpeded manner? It could not be a difference in the character of the government regulation in either case, for the burdens imposed on the asserted First Amendment interests of both Zemel and the reporters appeared to be incidental ones, caused by the application of generally applicable laws to them (i.e., the travel restrictions in *Zemel*, and the requirement of providing relevant grand jury testimony in *Branzburg*). Nor would it likely be the characterization of the travel restrictions in *Zemel* as a regulation of conduct that did not implicate protected expression, because it could be said that the government was doing the

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[276] *Branzburg*, 408 U.S. at 704 (citing Lovell v. Griffin, 303 U.S. 440, 450, 452 (1938)); *see also* Redish, *supra* note 47, at 261–64 (arguing persuasively that private corporations also perform an important informative function in our society).

[277] Indeed, it would be somewhat perverse to provide some constitutional protection for the gathering of "news" *about* such a study or report that had recently been published, and no protection for the gathering of the facts or information that served as a basis for the study or report on which the news media was reporting. This is especially true considering that a news report would almost always be a more superficial account of the information contained in such a study or report than the actual study or report itself.

same thing in *Branzburg*. The reporters there were not complaining that the government was violating any First Amendment right they may have had "not to speak" by making them testify as to their confidential sources, but were rather claiming interference with their right to gather news in an unhindered fashion.[278] In this sense, the government was not inhibiting rights of expression in *Branzburg* any more than it had been in *Zemel*. But there are two other important distinctions between the two cases.

First, unlike the press in *Branzburg* that had a defined First Amendment purpose for desiring unimpeded access to news sources (i.e., to publish the news), Zemel himself never alleged that he desired to go to Cuba in order to gather information for the purpose of engaging in public debate, publishing his findings, or otherwise communicating his findings.[279] In other words, Zemel never identified a First Amendment purpose for going to Cuba other than to become a "better informed citizen."[280] Using the words of Justice Douglas in his dissent in that case, what Zemel had really alleged was a "right to know."[281] And even though the Court, in its declaration about the rights of speaking and publishing not including an unrestrained right to gather information, appeared to presume Zemel would eventually communicate his findings to others, such a generalized speech presumption (or right to know) was apparently not a sufficient basis for the Court to recognize a First Amendment claim.[282] Such a basis for recognizing a First Amendment right would not be accepted by the Court until years later, and only then in the narrow context of the *Richmond Newspapers* right of access to criminal trials.

In a related vein, even if Zemel had alleged a general desire to engage in discussion about the things he would learn in Cuba, from the perspective of the "public informing" purpose of the First Amendment such speech would be much less efficacious than the "speech" intended by the reporters in *Branzburg*. Ordinarily, the "speech" of newspapers or television news programs would be expected to disseminate information to a much greater degree than the discussions or writings of an average person. Justice Powell suggested such a distinction in his *Saxbe* dissent where he argued that while the rights of speech and publication protect the "individual interests" in self-expression and personal fulfillment, the press is important with respect to fulfilling the "societal function" of that Amendment because "[n]o individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities."[283] Thus, the Court may well have believed that any recognition of a right to gather information

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[278] *See generally Branzburg*, 408 U.S. 665.

[279] *See Zemel*, 381 U.S. at 4, 16.

[280] *Id.*

[281] *See id.* at 23–24 (Douglas, J., dissenting).

[282] *Id.* at 16–17.

[283] *See Saxbe*, 417 U.S. at 862–63 (Powell, J., dissenting).

under the First Amendment should be limited to contexts where the public dissemination of that information can be assured.

In sum, there seem to be compelling reasons for rejecting the notion that the protection for information gathering recognized in *Branzburg* is limited to newsgathering activities, as well as the notion that *Zemel* was intended to lay down a general prohibition against the recognition of such a right for all but the organized press. However, what the *Zemel-Branzburg* decisions may suggest is that the recognition of a right to gather information may only be appropriate in situations where the societal, versus the individualistic, purposes of the First Amendment are being served in an identifiable way. This would suggest that such protection might be reserved to those channels of communication, like the organized press, that society relies upon for the dissemination of important information to the public. This Article will explore these ideas further in the next section. But before turning to this topic, it remains to discuss the apparent impact of *Cohen* on the constitutional protection *Branzburg* did recognize for newsgathering activities.

2. *Depth of Protection for Information Gathering from Non-Governmental Sources*

Although the Court in *Branzburg* declined to create a special testimonial privilege for news reporters, in reaching this conclusion it engaged in an extensive balancing of the First Amendment interests in newsgathering and society's competing interests in the effective enforcement of its laws.[284] And in two subsequent decisions, which pitted First Amendment interests in both gathering and reporting the news against the enforcement of general rules of criminal and civil procedure, the Court again declined to create special exemptions for the press but mainly on the basis of protections the Court had already created to protect the First Amendment interests at stake in those cases.[285] Thus, the Court's almost "flip" dismissal of the First Amendment interests at stake in *Cohen* appeared to be an aberration from its precedents in this area, at least in cases where the First Amendment interests in the gathering and dissemination of news had come into conflict with society's interest in the enforcement of its criminal laws (in *Branzburg* and *Zurcher*) and its civil defamation laws (in *Herbert*). And while it is true that there were different interests at stake in *Cohen*—i.e., both societal and individual interests in the enforcement of promises that induced reliance by others—it does not appear that these interests were any more important than those at issue in the earlier cases (and certainly not so much more important as to dispense with the need for any consideration of First Amendment interests).

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[284] *See supra* notes 95-97 and accompanying text.

[285] *See supra* the discussions of *Zurcher* and *Herbert* at notes 116 and 135.

Moreover, as one commentator has put it, while the *result* reached in *Cohen* was not unreasonable and might actually strengthen First Amendment interests in newsgathering (by assuring sources of news that promises of confidentiality are enforceable), the decision itself appeared to be "sloppily reasoned."[286] To support its apparent thesis that incidental burdens imposed on the press by laws of general applicability are subject to little or no First Amendment scrutiny, the Court relied on cases that simply did not support the application of that principle in *Cohen* itself. The Court first cited *Branzburg*, which definitely did not say that because the rules of criminal procedure at issue there were ones of general application, no consideration of First Amendment interests was warranted.[287] On the contrary, as described earlier, the Court engaged in an evaluation of the asserted First Amendment interests that was, if anything, probably more exhaustive than warranted.[288]

The *Cohen* Court also cited a number of cases dealing with the application of antitrust, labor, and tax laws to the *business* of operating a newspaper.[289] But to "burden" the business operations of the press by making it adhere to the same general economic regulations as other businesses would appear to be one thing; to permit the application of general contract laws in a way that burdens its newsgathering and reporting activities without any consideration of society's competing First Amendment interests is quite another. In the former case, potential threats to First Amendment interests seem extremely remote and attenuated, while in the latter case the more specific application of general laws to distinctly speech-related activities pose a much greater threat.[290] Finally, the Court relied on a case where it held that the press could be held liable under a State's general "right of publicity" law for broadcasting a "human cannonball's" act in its entirety as part of a news broadcast, and allegedly diminishing the

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[286] *See* Alan E. Garfield, *The Mischief of Cohen v. Cowles Media Co.*, 35 GA. L. REV. 1087, 1087 (2001); *see also generally*, Jerome A. Barron, *Cohen v. Cowles Media and its Significance for First Amendment Law and Journalism*, 3 WM. & MARY BILL RTS. J. 419 (1994).

[287] *See Cohen*, 501 U.S. at 669.

[288] *See supra* notes 95-97 and accompanying text. It is worthy of note that Justice White's opinion for the Court in *Branzburg* ran 42 pages in the U.S. Reporter, with 42 footnotes.

[289] *See Cohen*, 501 U.S. at 669.

[290] *See* Easton, *supra* note 25, at 1157 (observing that the general economic regulations at issue in *Cohen* "appear[ed] to pose only the most attenuated threat to established First Amendment rights," and therefore showed the doctrine of no First Amendment scrutiny for laws of general application "in its most innocuous and apparently acceptable form"); *id.* at 1162 (The economic regulation cases concede only that such "regulations of general applicability may be imposed on businesses engaged in First Amendment activities . . . provided the integrity of those activities is never threatened. These cases have nothing to say about laws . . . which still may be applied to obstruct newsgathering or stifle publication of truthful information. . . .").

commercial value of that performance.[291] However, even in that case, the Court gave due consideration to the competing First Amendment interests, implying that the Amendment might have prevented recovery had the newscast used less than the *entire* act at issue.[292]

Considering then, the dearth of support for the Court's analysis in *Cohen*, what might have lead it to abjure any sort of *Branzburg* balancing or weighing of the First Amendment interests in that case?[293] The answer appears to be the

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[291] *See id.* at 1164 (citing Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576–79 (1977)).

[292] *See Zacchini*, 433 U.S. at 574–75 ("It is evident . . . that petitioner's state-law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner's act. Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent.") (footnotes omitted)).

[293] Not only was the Court's approach in *Cohen* inconsistent with that utilized in *Branzburg*, but it was also in substantial tension with its traditional "symbolic conduct" and "time, place or manner" doctrines which subject even content-neutral regulations of conduct related to speech to an "intermediate" level of First Amendment scrutiny. *See supra* notes 32–34 and accompanying text. The Court explicitly acknowledged this tension in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 640 (1994), where it compared the approach it took in *Cohen* to that of another decision where intermediate scrutiny had been applied to a general ban on public nudity, and stated simply that "the enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment." *Id.* at 640. And although the *Turner* Court did not discuss this fact, in an earlier decision the Court had attempted to explain when laws of general application would be subject to heightened scrutiny under the First Amendment. *See* Arcara v. Cloud Books, Inc., 478 U.S. 697, 704–08 (1986) (explaining that such laws would be subject to heightened scrutiny when they (1) were applied to activity with a significant expressive element, (2) had the inevitable effect of singling out those engaged in expressive activity, or (3) were enforced as a pretext for suppressing protected speech). But certainly the application of the promissory estoppel laws in *Cohen* restricted the press' *publication* of news, an activity that could not be more expressive. Thus, *Cohen* should have been analyzed in the same manner as the decision where the Court applied intermediate scrutiny to a general ban on public nudity which allegedly burdened "expressive" nude dancing.

Be that as it may, however, one might attempt to explain the Court's dicta about *newsgathering* not meriting First Amendment scrutiny in this context by the fact that it is generally *non-expressive* conduct with a more attenuated connection to expression than the non-expressive components of symbolic conduct or the non-expressive aspects of general communicative activities. *See supra* notes 50–52 and accompanying text. In other words, it is more difficult to say in the former context that the conduct being restricted has a "significant expressive element" than it is in the latter two contexts where the conduct and speech are closely bound up with each other. However, as Dean Elena Kagan has explained, the *Arcara* rule does not fully exhaust the situations where the Court has applied heightened scrutiny to generally-applicable laws. *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment*

different nature of the conduct engaged in by the press in the two cases, which may have led the Court to view the propriety and justification for enforcing the generally applicable laws differently.[294] In *Branzburg* and other cases, the Court has suggested strongly that First Amendment protection does not extend to the wrongful or unlawful acquisition of news, nor to the publication of such news by the wrongdoing party.[295] And *Branzburg* itself involved no allegations that the newsgathering at issue in that case involved wrongful or unlawful activity.[296] The burdens on newsgathering imposed by the rules of criminal procedure in that case were truly "incidental" in the sense of being unintended: those laws were not

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Doctrine, 63 U. CHI. L. REV. 413, 497–99 (1996). As she discusses, in *United States v. Albertini*, 472 U.S. 675 (1985), the Court applied intermediate First Amendment scrutiny to a law barring the reentry into a military base of a person who had previously been expelled and who desired to reenter for the purpose of distributing leaflets. *See. id.* at 497 n.228. And "contrary to the Court's analysis, the conduct that drew the sanction—the reentry—was not itself expressive, although the policy regulating reentry interfered with the leafletter's ability to engage in expressive activity." *Id.* Obviously in this case, the Court must have believed that the non-expressive conduct being regulated was sufficiently bound up with the expressive acts itself to apply heightened scrutiny to that general law. Given that newsgathering is similarly bound up with expressive activities—just as Albertini's access was necessary for him to engage in his expressive activities, so newsgathering is necessary to publishing—*Albertini* undermines the dicta in *Cohen*, which barred scrutiny of general laws that interfere with newsgathering activities. In my view, such laws should at least be subject to some form of *Branzburg* balancing of the public interests involved. *See infra* notes 299–301 and accompanying text; *accord* Smolla, *supra* note 25, at 1248–51 (arguing for a newsgathering privilege against privacy torts based on general balancing of interests involving specific privacy interests at stake, value of news story, and necessity of engaging in surreptitious newsgathering methods). *But see* Chemerinsky, *supra* note 21, at 1160–61 (urging a straightforward application of the Court's "intermediate scrutiny" analysis to the application of general tort and criminal laws to newsgatherers). One issue I see with Professor Chemerinsky's thoughtful proposal is that is treats all content-neutral regulation of speech and speech-related conduct as presenting similar conflicts between First Amendment and other societal interests, where the presumption in all of these cases would be made to favor speech interests. As I discussed in Part I, however, the more attenuated the relationship becomes between the non-expressive conduct being regulated and the expression it facilitates, the greater society's interest will likely be in regulating such conduct. *See supra* notes 48–52 and accompanying text.

[294] *See also* Easton, *supra* note 25, at 1173 ("The operative reason for denying some degree of constitutional scrutiny in *Cohen* is revealed in Justice White's argument that the Minnesota newspapers may not have 'obtained Cohen's name "lawfully" ' in this case . . . .") (citation omitted).

[295] As Professor Easton has pointed out, however, in decisions preceding *Cohen* the Court had expressly reserved the question of whether the *publication* of unlawfully acquired news could be punished. *See id.* at 1174–76; *see also* Bartnicki v. Vopper, 532 U.S. 514, 528, 532 n.19 (2001) (continuing to reserve this question, but suggesting that the unlawful acquisition of the information itself could be punished).

[296] *See generally Branzburg*, 408 U.S. 665.

designed to force members of the press into breaching their promises of confidentiality, but rather to compel any member of society possessing relevant information about a crime to provide that information to a grand jury on request.

In *Cohen*, by contrast, the promissory estoppel laws at issue were designed to redress the very type of conduct engaged in by the press in connection with its newsgathering activities—i.e., the breaking of a promise that one has induced another to rely on. In several different portions of its opinion, the Court made it clear that the perceived impropriety of the press' conduct was a significant factor in its ruling.[297] In a sense, then, the burden imposed on the newspaper's publication of information in *Cohen* was *not* incidental or unintended, but rather the very aim of the law (i.e., to encourage members of society, including the press, to either keep their promises or compensate a promisee for any harm caused by failing to keep them). Thus, a better way of interpreting *Cohen* is *not* that it intended to eliminate any *Branzburg*-type scrutiny of general laws that unintentionally burden First Amendment activities, but rather that when such laws aim to regulate the type of conduct engaged in by the press as part of its newsgathering activities, there will be a heavy presumption in favor of their constitutionality. Read in this way, *Branzburg* balancing would not be eliminated in the context of all generally applicable laws, but would continue to be applied in those situations where such laws burden the activities of the press in a genuinely incidental way.[298]

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[297] *See Cohen*, 501 U.S. at 669 ("[T]he truthful information sought to be published must have been lawfully acquired. The press may not with impunity break and enter an office or dwelling to gather news."); *id.* at 671 ("Minnesota law simply requires those making promises to keep them."); *id.* at 671 ("[I]t is not at all clear that respondents obtained Cohen's name 'lawfully' . . . . "); *id.* at 672 (enforcing the promissory estoppel laws "is no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them").

[298] Indeed, this explanation of *Cohen* could explain why lower courts have virtually ignored it in continuing to apply a First Amendment journalists' privilege against the application to journalists of generally applicable rules of civil procedure. *See supra* notes 98–99. Of course, another reason for this could be the procedural nature of such rules, as opposed to the substantive nature of contract law, for example. One could also distinguish *Cohen* from *Branzburg* based on the severity of the burden imposed on First Amendment interests by the law at issue in each case. As mentioned earlier, in *Branzburg* the press' claim was that compelling reporters to testify before the grand jury would deter informants from providing newsworthy information to it. In *Cohen*, by contrast, the alleged burden was a more narrow one of deterring the press from *reporting* the identity of a source when it believed that information itself was newsworthy. While on the surface the latter burden might seem to strike more closely at the heart of First Amendment protection (i.e., burdening "speaking" rather than "gathering"), on closer reflection it would seem that the First Amendment objective of facilitating a full flow of relevant information to the public would be stifled in a much greater way if the press were prevented from acquiring newsworthy information in the first place, than if the press

But even though this rationale might reasonably identify the basis for the Court's different approaches in *Branzburg* and *Cohen*, it is not to suggest that the Court was correct in essentially repudiating any First Amendment protection for newsgathering conduct that is alleged to run afoul of general contract, tort, property, intellectual property, or even less serious criminal laws. To *automatically* resolve all such conflicts between First Amendment interests and the contending interests reflected in such laws in favor of the latter seems unwise and unwarranted. Both of the constitutional and contending interests are of an important *societal* nature, and there is no good reason to believe that society would wish a preordained and unexamined decision in favor of general laws in all cases.[299] To assert that legislatures in passing such laws foresaw and considered

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were occasionally deterred from revealing its specific sources of certain information. Thus, it could be argued that the burden imposed on First Amendment objectives from enforcing generally applicable laws was much less in *Cohen* than it was in *Branzburg*, thus dispensing of the need for any sort of First Amendment balancing. *See also Cohen*, 501 U.S. at 677-78 (Souter, J., dissenting) (suggesting that the majority's decision in *Cohen* might also be explained by the theory that the press had waived its First Amendment rights in the case by promising not to reveal Cohen's identity, but rejecting this explanation as inadequate).

An insightful and provocative article by Dean Elena Kagan suggests yet another basis upon which *Cohen* might be distinguished from *Branzburg* (and even *Zemel* for that matter). *See generally* Kagan, *supra* note 293. At the risk of oversimplying, Dean Kagan suggests that the level of First Amendment scrutiny the Court will apply to a law (whether general or not) is really determined by its view of whether the government's purpose is to suppress particular speech in a given case. This generally means that the more *discretion* the government has in applying a law to conduct related to speech, the greater the potential for impermissible motivations to be affecting the government's actions. *See id.* at 456–61. On this view, the promissory estoppel laws enforced in *Cohen* (which were not even initiated by the government, but rather by a *private* party) and the general travel ban enforced in *Zemel*, presented much less risk that the government's actions were impermissibly motivated than the criminal discovery rules at issue in *Branzburg* where the government seemingly had more discretion to apply those rules in the sense of urging grand juries to compel information disclosures from reporters. This analysis suggests that the application of general laws to newsgathering activities should be subject to increasing scrutiny as the government's discretion in enforcing such laws increases. However, I do not believe the lack of such discretion in a given case, as in *Cohen*, is sufficient reason to obviate any sort of First Amendment scrutiny. *See infra* notes 299–301 and accompanying text.

[299] Of course, such general laws also seek to protect important *individual* interests as well. But this still does not mean there ought to be *automatic* resolutions of such conflicts in favor of general laws in every case. For instance, taking a perhaps extreme example, let us suppose a reporter learned that a company was dumping drums of toxic waste into a river that ran through its property, that the company had bought off law enforcement officials to look the other way (or such officials simply refused to investigate without certain proof), and that the reporter committed a minor trespass to take photographs of these activities for publication in the local newspaper. Can it be seriously doubted that the public interest in such newsgathering activities would not greatly outweigh the individual

all conceivable conflicts with other important interests reflected in the Constitution, or that judges in developing common law doctrines did the same, seems to border on the fanciful.[300] Accordingly, instead of rejecting the applicability of the First Amendment in such contexts, the constitutional interests in newsgathering ought to be explicitly recognized. But just as in other areas of First Amendment law, the general nature of the government restrictions in these cases might well counsel in favor of a lower level of scrutiny being applied to them.[301]

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and societal interests in applying criminal and tort trespass laws in such a case? *See also* Stone, *supra* note 96, at 107 (asserting, without specifically addressing the problem of "speech-related information gathering," that general laws incidentally burdening speech should not always "be beyond the scope of first [sic] amendment [sic] review. The potential restrictive effect of such laws is simply too great to disregard them entirely.").

[300] Indeed, many different scholars have persuasively decried the rote application of the *Cohen* "shibboleth" by lower courts, especially in the context of alleged newsgathering torts. *See* Smolla, *supra* note 25, at 1247. Thus, scholars have proposed various newsgathering privileges and other legal standards for giving the public's First Amendment interests in such conflicts its due. See *supra* note 293 for a discussion of Professor Smolla's and Chemerinsky's proposals. Professor Easton has proposed that a newsgathering tort plaintiff be required to prove "deliberate wrongdoing in bad faith or outrageous conduct" by a journalist akin to the *New York Times* actual malice standard in the libel setting. *See* Easton, *supra* note 25, at 1212–15; *see also* Chemerinsky, *supra* note 21, at 1161 (describing various proposals of different scholars). *But see generally* Bezanson, *supra* note 25, at 916–25 (arguing against special First Amendment protection for newsgathering).

[301] The Court has scrutinized general laws less closely primarily because they are less likely to be designed to suppress speech at all (in the case of general regulations of conduct), or to suppress any particular kind of speech (in the case of generally applicable regulations of speech itself). Thus, I might agree that in the newsgathering context, a *Branzburg*-like balancing of interests should be applied, but favor the application of such laws—creating a rebuttable presumption of enforceability if you will—which could be overcome upon a showing of a sufficiently strong First Amendment news value in a particular story. Compare Professor Smolla's approach at *supra* note 293. Since I will argue later, however, that those seeking to invoke a right to gather information (regardless of whether it is "news" or otherwise) must first demonstrate that the information sought is or was of sufficient "public concern" to satisfy the societal or structural purpose of the First Amendment, *see infra* notes 319–29 and accompanying text, a newsgatherer defending against the application of general laws would first need to meet a "threshold" showing of "news value" before even being eligible for such a balancing analysis. Thus, for instance, to the extent the claimed "news" involved a tabloid report on the exploits of an entertainment figure, the *Cohen* approach of no First Amendment scrutiny for allegedly tortious conduct in gathering such information might well be appropriate given the questionable social value of such information. *See infra* note 328 for a more extensive discussion of this issue.

Dean Kagan argues that the Court once expressly took the position that general laws should be subjected to First Amendment scrutiny when they burden expressive activity precisely because the legislatures in passing such laws would not have weighed the First

As explained earlier, however, even if *Cohen* were interpreted to preclude First Amendment scrutiny of any general laws in the newsgathering context, *Branzburg* presumably would not be relegated entirely to the dustbin of history. This is because the Court in *Cohen* certainly did not retract its assertion in *Branzburg* that newsgathering was entitled to some First Amendment protection. Hence, even were *Cohen* viewed as narrowing *Branzburg* in cases involving the enforcement of generally applicable laws, presumably laws or government actions targeting newsgathering or other speech-related information-gathering activities would still remain subject to meaningful First Amendment scrutiny.[302]

C. *Summary of Critiques Regarding the Supreme Court's Information-Gathering Jurisprudence*

In summary, the Court has without sufficient justification refused to recognize a general right to gather information from the government, while at the same time acknowledging that such a right is a logical necessity in the context of information gathering from other sources (at least with respect to newsgathering activities). On the other hand, it is similarly unsupportable to base a First Amendment right of access to a narrow category of governmental information on the broad, amorphous ground of a public right to know. Additionally, in the context of gathering information from non-governmental sources, limiting the general protection that has been recognized solely to the collection of "news" would not accord with general First Amendment principles or sound policy. And finally, interpreting the Court's decisions in this area to eliminate any protection for information gathering when they happen to conflict with laws of general application seems unwarranted and unwise.

IV. TOWARDS A COHESIVE AND WORKABLE RIGHT TO GATHER INFORMATION UNDER THE FIRST AMENDMENT

Amendment interests involved against the competing societal interests. *See* Kagan, *supra* note 293, at 493–97. However, she asserts that in more modern times the Court has abandoned this position in favor of applying a more deferential standard of review to such laws because, as noted above, the risk of improper government "speech-suppression" motives will normally be lower with respect to the enforcement of laws of general application. *See id.* Even assuming this description is accurate, as Dean Kagan herself points out, the Court still applies heightened scrutiny to general laws regulating non-expressive conduct when that conduct is sufficiently bound up with expressive activity. *See id. at* 497–98; *see also supra* note 293. In such cases, it seems impossible to identify the Court's precise reasons for doing so, which are likely some mix of a greater suspicion about government motivations *as well as* a concern that lawmakers have not sufficiently weighed the competing societal interests at stake.

[302] It is not surprising then that lower courts continue to subject laws or government actions designed to specifically restrict newsgathering activities to meaningful First Amendment review. *See supra* notes 221-22 and accompanying text.

On the basis of what principles, then, can a more consistent, logical, and desirable First Amendment information-gathering rights jurisprudence be premised? A couple of principles appear to be fairly well settled, at least in the context of general free speech jurisprudence. First, if such a right is to be recognized at all, it ought to apply both to the gathering of information created or controlled by the government—information that is generally of an inherently political or "core" nature for First Amendment purposes—as well as to the gathering of information from non-governmental sources.[303] Second, in a related vein, the very existence of such a right should not be based on the general content or subject matter of the information sought to be gathered for First Amendment purposes.[304] Thus, the availability of such a right should not be based on whether the acquisition of information is being sought from governmental versus non-governmental sources, nor should any distinctions be drawn solely on the basis of whether the information being gathered can be classified as "news" or another sort of information.

Stated somewhat differently, the recognition or non-recognition of an implied right to gather information under the First Amendment should not depend—as it appeared to be in most of the Court's decisions in this area—on the nature of the specific opposing interests being asserted by the government in a particular case, or on the particular philosophy or temperament of the judges that may happen to be assessing this question at a given point in time. Rather, the very existence of such a right should be based on a more foundational and enduring assessment of the First Amendment values promoted by information-gathering activities,[305] and the potential costs to society of recognizing a constitutional right to engage in them (for example, difficulties in administering it or the potential for creating increased conflict with other social interests). Only when such a basis for a right to gather information has been clearly articulated, established, and agreed upon—such as to promote informed decision-making on matters important to self-governance—can the competing interests asserted by the government in a

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[303] *See supra* notes 244–52 and accompanying text. This is not to say that some special considerations cannot apply to such a right by virtue of the "affirmative" or "offensive" nature of a right to gain access to information that the government is declining to disclose. *See infra* note 341.

[304] *See supra* notes 223–25 and accompanying text. As stated earlier, however, I will argue that there is one legitimate content distinction upon which the existence of a right to gather information can and ought to be predicated: that the information sought be of sufficient public concern to satisfy the societal purposes of the First Amendment. See *infra* notes 312–13, 319–29 and accompanying text for a general discussion of this issue and why this would be a legitimate content-based treatment of speech in the information-gathering context.

[305] Of course, in evaluating the existence of a constitutional right, adequate due should also be given to the history and text of the constitutional provision at issue. *See supra* note 263.

particular case be properly evaluated against stable and settled First Amendment principles. Moreover, only then will interested parties, lower courts, and society in general have sufficient notice as to which sort of information-gathering activities implicate constitutional protections and which do not.

Based on the various analyses that have been invoked by the Court in the different contexts in which a right to gather information has been asserted, it appears that at least three basic approaches to such a right might be considered. First, as exemplified by the majority's views in *Zemel*, *Pell-Saxbe* and *Houchins*, it would be possible to strictly tie the scope of any First Amendment protection to its plain text—i.e., to protect the activities of speaking, publishing or other expressive acts. On this view, there would be no constitutional protection accorded to information-gathering activities *per se*, and any right to obtain particular information would be left primarily to the political or legislative process. But as Justice Powell argued in his *Pell-Saxbe* dissent, while such an approach might have the "virtue of simplicity" and delineate "the outer boundaries of First Amendment concerns with unambiguous clarity," it would appear inadequate "to preserve First Amendment values amid the complexities of a changing society."[306]

With respect to governmental information, as discussed earlier, laws mandating a public right of access to certain government records and proceedings have come a long way in the last fifty years to promote open governance. However, it is widely contended such laws still leave a substantial gap with respect to information that may be the most critical in making important decisions about the performance and activities of our government representatives.[307] I have also discussed other reasons why leaving the question of access to government information completely in the hands of government officials is not a sound constitutional policy.[308] As to the gathering of information that may be available outside the walls of government institutions, including the public conduct of government officials or the effects of government policies, the Court in

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[306] *Saxbe*, 417 U.S. at 875 (Powell, J., dissenting).

[307] *See supra* notes 258–62 and accompanying text. Moreover, as Professor Sunstein has argued, under a structural view of the First Amendment the primary purposes of a right of access to government information are to protect against self-interested behavior by political representatives and the "control of government by powerful private groups." Sunstein, *supra* note 24, at 891–92, 920. But as he persuasively argues, an "equilibrium theory" of the First Amendment under which *access* to government information is given *no* protection while the *publication* of information about government is given *full* protection, is inadequate to achieve these First Amendment objectives. *See id.* at 898–904, 920–21; *see also The Checking Value*, *supra* note 25, at 527, 610 (arguing that the First Amendment value of "checking" the malfeasance and misconduct of government officials was uppermost in the minds of the Framers, and that a right of access to government information should be viewed as embodying First Amendment values of the "highest order" in order to achieve this objective).

[308] *See supra* notes 247–52 and accompanying text.

Branzburg properly recognized that important flows of information to the public can just as effectively be curtailed by interfering with access to information sources as by restricting the communication of information itself.[309] One only needs to look at a country like China for a poignant illustration of how effective abridging information flows at their source can be in controlling public discourse.[310]

As a second approach, and on the opposite end of the First Amendment spectrum in terms of respecting its literal text, it would be possible to expand on the Court's approach in the *Richmond Newspapers* line of cases and essentially create a public "right to know" certain information. I have already explained why it would be difficult to fairly imply such a right from the First Amendment's guarantee of freedom of "speech" or "press."[311] But even if this could be done, presumably it would be necessary to attempt a description or definition of the information that the public was entitled to obtain or receive, perhaps along the lines of a "public interest" or "public concern" definition that has been utilized by the Court in other areas of First Amendment law.[312] Such an approach would at least avoid the pitfall of improperly regulating speech or information flows on the basis of its subject matter or content, since the Court has recognized that speech about matters of public concern is at the "core" of First Amendment protection and entitled to special consideration in certain settings.[313]

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[309] See, for example, *supra* notes 284–302 and accompanying text for a discussion of the need for some constitutional protection for newsgathering that is inhibited by laws of general application.

[310] *See, e.g.*, Peter S. Goodman & Mike Musgrove, *China Blocks Web Search Engines*, WASH. POST, Sept. 12, 2002, at E1 (observing that "[t]he Communist Party remains committed to maintaining its monopolistic grip on political power by controlling what Chinese people see and read"). Additionally, by failing to give sufficient protection to the efforts of investigators and researchers that our society counts on for important information—such as the organized press, academic and scientific researchers, or researchers employed by private public policy groups—our "information society" risks the facilitation of vacuous or superficial flows of information and ideas that are insufficiently supported by empirical research and verifiable data. Indeed, some scholars have made a persuasive case that the Court's jurisprudence governing the organized press—including its tepid support for newsgathering activities—has incented the press to engage in news reporting that is frequently superficial and irrelevant while discouraging reporting on well-researched, serious matters. *See generally* William P. Marshall & Susan Gilles, *The Supreme Court, the First Amendment, and Bad Journalism*, 1994 SUP. CT. REV. 169 (1995). *But cf.* Anderson, *supra* note 1, at 518–19 (supporting nonconstitutional privileges for press to gain access to information, but opposing First Amendment rights on grounds that press has sufficient political power to gain needed access and a constitutional right would be too difficult to administer).

[311] *See supra* notes 264–73 and accompanying text.

[312] *See infra* note 313.

[313] *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 528, 533–34 (2001) (asserting that a law implicated "the core purposes of the First Amendment because it impose[d] sanctions

However, the obvious downside to such a justification for a right to gather information would be that any individual alleging a public interest in certain information would presumably be entitled to challenge any law or government action inhibiting access to it.[314] In other words, such a right would be truly "endless," creating an undesirable increase in social conflict and burdening the judiciary with the difficult task of resolving such conflicts. But perhaps even more importantly, permitting individual challenges to alleged interferences with information flows would not necessarily serve the purposes for which a right to know was recognized in the first place—to disseminate valuable information to the public. Take the *Richmond Newspapers* right of access to criminal trials as an example. Under the Court's theory, an individual seeking access to a murder trial purely for the purpose of being titillated by the grisly information expected to be revealed there, with no desire whatsoever to speak with anyone outside the courtroom about the trial, would nevertheless be entitled to challenge a legitimate request by the defense or prosecution to close the trial or any portion of it to the public. Hence, the Court appears to have seriously undermined the societal purpose of a right of access by permitting any member of society to invoke it without demonstrating a "public" justification for doing so.

A third, and possibly the most balanced and principled approach, would be to respect the textual limitations of the First Amendment while relying on the fair implications of those provisions to protect information-gathering conduct necessary for preserving valuable information flows to the public. This would mean implying such a right from the freedoms of "speech" or "press." But to do so, some initial premises would need to be established. As both the Court and prominent First Amendment scholars have recognized, the freedoms of speech

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on the publication of truthful information of public concern"); Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988) (declaring that "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern"). In the areas of defamation law, privacy law, and speech of government employees, the Court has used a "public concern" test to provide special First Amendment protection for speech even though this could be characterized as a content-based regulation. *See generally* Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1 (1990); *see also id.* at 2 (describing public concern test as "an explicitly content-based category of privileged 'public issue' speech that alone is entitled to certain important protections"). See *infra* notes 319–29 and accompanying text for a further discussion of the relationship of speech of public concern to an information-gathering right.

[314] *See, e.g.*, Anderson, *supra* note 1, at 525 (The Press Clause should not be read to "guarantee each person, or even each journalist, the right to gather information as he or she sees fit. Such a guarantee would be unworkable because there are too many information gatherers, even too many journalists, to all be accommodated"); *Informed Public*, *supra* note 24, at 509 (arguing against a right to know government information in part because "no government could function under the constraints of having to honor every request of every citizen for information").

and press have at least two major purposes: first, to protect *individual* interests in expressing oneself and fostering personal self-fulfillment, and second, to protect various *societal* interests, not the least of which is the promotion of intelligent self-government.[315]

And to the extent the Court has been willing to recognize First Amendment protection for non-expressive conduct associated with the gathering of information, it has been solely on the basis of protecting those *societal* interests. Thus, the Court in *Branzburg* recognized that newsgathering for the purpose of reporting news to the public was entitled to some constitutional protection, and in the *Richmond Newspapers* line of cases protection was premised, at least theoretically, on the promotion of public discussion about governmental affairs. In contrast, the attainment of information for more individualized purposes, such as in *Zemel* (or even the more individualized commercial interests at issue in *United Reporting*) has not been recognized as a sufficient basis for extending the outer boundaries of the First Amendment. And this is as it should be.

As I have explained earlier, the Court has made it clear that First Amendment protection tends to diminish as conduct moves from "pure speech," to conduct that is expressive in nature, and finally to conduct of a predominantly non-expressive nature.[316] Extending constitutional protection to information-gathering activities creates a potential for a much greater range of conflict with other interests valued by society than protecting expressive activities alone.[317] Thus, it would only seem appropriate then to sustain these additional social costs when *society* is receiving a commensurate benefit. In other words, although no one could gainsay the importance of freedom of *expression* to promoting individual well-being, such interests alone would appear inadequate to justify the social costs that would result from extending constitutional protection to *non-expressive conduct* engaged in mainly for "individualized" purposes (such as Mr. Zemel's desire to get better acquainted with Cuba). In short, it would seem only proper that a social quid pro quo be attached to extending the scope of First Amendment protection to cover conduct that is antecedent to speech and that bears a more attenuated connection to expressive acts than other forms of conduct protected as speech.[318]

Accordingly, such a quid pro quo would demand that certain requirements be met before a party is entitled to invoke a First Amendment right to gather

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[315] *See supra* notes 30 and 112.

[316] *See generally supra* Part I; *see also, e.g.*, LAPD v. United Reporting Publ'g Corp., 528 U.S. 32, 39–40 (1999) (asserting that First Amendment overbreadth protection "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws") (internal citations omitted).

[317] *See generally supra* Part I.

[318] *See supra* notes 48–52 and accompanying text.

information. These requirements would be designed to provide assurance that one's information-gathering activities indeed promote the societal interests of that Amendment before constitutional protection could be claimed with respect to them. First, then, it should be required that the type or content of information sought be of a character that could reasonably be said to foster or promote those societal interests. Although both the Court and commentators have given various accounts of the different societal interests promoted by that Amendment,[319] it is clear that, at least in its decisions dealing with a right of access to governmental information, the Court has focused on the interest in fostering informed democratic self-governance.[320] And while scholarly commentators have long debated whether the type of speech or information regarded as being necessary to such democratic processes should be confined to predominantly "political" speech, or whether it should include a much broader conception of topics relating to issues of public interest or concern,[321] it would plainly at a minimum consist of information of a governmental or political nature.

Thus, efforts to gather and disseminate information about the operations and affairs of our government, including the impact of laws and policies adopted by it, would presumptively fit within this first requirement for claiming First Amendment protection for information-gathering activities. This requirement would help that Amendment to get off its head and back onto its feet after being bowled over by *Pell-Saxbe* and *Houchins* as to a general right of access to information created or controlled by the government. However, displaying more certainty about this issue than many commentators, the Court has also declared that speech on matters of general public concern is "the essence of self-government" and thus entitled to "special protection."[322] Under current First

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[319] At a high level of generality, the two main societal interests thought to be promoted by the First Amendment are the fostering of democratic self governance, and the discovery of truth through the facilitation of a marketplace of ideas. *See supra* note 30; *see also* SMOLLA, *supra* note 29, at 2-11 to 2-45.

[320] *See supra* notes 169–70 and accompanying text; *see also* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978) (" 'Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.' ") (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)). And even the dissenters in *Branzburg* emphasized this aspect of the First Amendment in arguing for a right of the press to gather information from non-governmental sources. *See Branzburg*, 408 U.S. at 726–27 (Stewart, J., dissenting) ("Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society."); *id.* ("Not only does the press enhance personal self-fulfillment by providing the people with the widest possible range of fact and opinion, but it also is an incontestable precondition of self-government.").

[321] *See* SMOLLA, *supra* note 29, at 2-41 to 2-45.

[322] *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985) (plurality opinion) (" '[S]peech concerning public affairs is more than self-

Amendment doctrine, therefore, it seems that information meeting such a "public concern" standard would also be considered to promote the societal purposes of that Amendment for purposes of an information-gathering right. The main problem under this standard, however, is determining what types of information would meet it.[323]

In answering this question for the purpose of giving certain speech special constitutional protection in different settings, the Court has suggested fairly amorphous standards for identifying speech on matters of public concern. In cases involving defamation and government employee speech, the Court has instructed that " 'whether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form and context . . . as revealed by the whole record.' "[324] Factors relevant to this determination have been held to include whether or not the speech was " 'of political, social or other concern to the community,' "[325] whether it was engaged in purely for personal or individual reasons, and the extent to which the information was publicly disseminated.[326] In other cases involving conflicts between privacy interests and the First Amendment, the Court has indicated that speech on matters of public concern embraces " 'all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' "[327] This standard suggests that some showing of societal need for information might be appropriate in determining whether information pertains to a matter of public concern.

As in these other areas of First Amendment law, there is no doubt that premising a right to gather information on meeting a "public concern" threshold would present definitional challenges (at least apart from information of a clearly political nature). But courts appear to be applying these general standards to reach

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expression; it is the essence of self-government.' " (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)). "Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values' and is entitled to special protection." (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982))).

[323] Another problem might be that such a "public concern" standard is too broad for determining those who are eligible to claim First Amendment protection for engaging in information-gathering activities, considering the potential social costs associated with such a right. However, two other minimum requirements that I am proposing must be satisfied before such a right could be invoked should sufficiently ameliorate this concern. *See infra* notes 330-40 and accompanying text.

[324] *Dun & Bradstreet*, 472 U.S. at 761 (plurality opinion) (quoting Connick v. Myers, 461 U.S. 138, 147–48 (1983)).

[325] SMOLLA, *supra* note 29, at 18-22 (quoting *Connick*, 461 U.S. at 146).

[326] *See id.* at 18-21 n.7, 18-22.

[327] Bartnicki v. Vopper, 532 U.S. 514, 534 (2001) (quoting Time, Inc. v. Hill, 385 U.S. 374, 388 (1967)).

reasonable results in these other areas of the law,[328] and there seems to be no reason to believe that sound judgment and common sense would not also prevail

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[328] According to one commentator:

> The cases suggest that generally the following will be considered matters of public concern in terms of the *Dun & Bradstreet* definition: politics and campaigns; operations of financial institutions; conduct of government and public officials; illegal or questionable business practices with ramifications for the general public; public health and safety; criminality and criminal justice; recruitment methods of a religious cult; pornography; and athletics.

Robert E. Drechsel, *Defining "Public Concern" in Defamation Cases Since* Dun & Bradstreet v. Greenmoss Builders, 43 FED. COMM. L.J. 1, 12–13 (1990). Although the "pornography" and "athletics" may sound questionable as matters of public concern without additional context, they involved criticisms of an anti-pornography activist and the conduct of a high school coach during a game. *See id.* at 13 nn.83 & 84. Of course, this raises the interesting question of to what extent journalists engaged in investigating and delivering "newstainment" might be considered to be engaged in information gathering with respect to matters of public concern. At least one court has recently appeared to answer this question in the negative. *See In re* Madden, 151 F.3d 125, 130–31 (3d Cir. 1998) (declining to extend First Amendment journalists' privilege to 900-number "hotline commentator" for a "professional wrestling" outfit). And in addition to the issue of mixed news-entertainment reporting, another nettlesome issue in terms of identifying matters of public concern in this context is the question of to what extent a person gathering information for commercial speech purposes would be entitled to First Amendment protection, especially given the lower level of "speech" protection the Court accords to commercial speech. Moreover, to have courts making determinations about which types of speech warrant special information-gathering protection and which do not presents difficult problems of its own. *See* Anderson, *supra* note 1, 528–30 (arguing that because the "press" is increasingly being defined by content rather than format, its valuable societal role is in danger of disappearing because of modern reluctance to allow government to accord special legal protections based on its judgments about the "public importance" of speech). *But see Press Enterprise I*, 464 U.S. at 519 (Stevens, J., concurring) (arguing that the government should have more latitude to administer a First Amendment right of access based on the content of the information being sought, than it would have in regard to regulating speech itself on the basis of its content). There is no doubt that these are challenging issues that will require much more consideration and care to work out. However, a more detailed consideration of them here is beyond the scope of the present Article. It should be noted, however, that in tort actions against the press for the publication of private facts, courts have routinely made determinations about what type of news is sufficiently "newsworthy" or "of public concern" to provide the press with First Amendment protection against liability for such publications. *See, e.g.*, Shulman v. Group W Prods, Inc., 74 Cal. Rptr. 2d 843, 852–60 (Cal. 1998). If workable determinations about such issues can be made in this setting, there is no reason to believe that they could not similarly be made in the information-gathering context. *See also generally* Andrew B. Sims, *Food for the Lions: Excessive Damages for Newsgathering Torts and the Limitations of Current First Amendment Doctrines*, 78 B. U. L. REV. 507 (1998) (proposing limitations on damages awards for newsgathering torts based in part on whether the information sought met various levels of public concern in different contexts).

in determining whether information sought to be gathered was of a sufficient "public" character to be eligible for constitutional consideration.[329] Any First Amendment distinctions premised upon the public character of speech or information will necessarily be somewhat untidy because there is simply no way to define these characteristics with any precision for every conceivable type of expression. But this does not mean the objective of drawing such distinctions—to define speech or information that may be worthy of greater constitutional protection because of its value in fostering enlightened social decisions—should be abandoned because of these challenges.

However, focusing solely on the political or public character of information sought to be gathered would not be sufficient to ensure that the societal interests of the First Amendment were being served by an information-gathering right. Such a lone requirement would effectively convert a right to gather information for First Amendment purposes back into a general right to know. Consider the hypothetical offered earlier of an individual seeking access to a murder trial for no other reason than the satisfaction of personal proclivities. Such an individual would presumably satisfy the first requirement of the information-gathering right I have proposed given the issues of justice administration and similar matters that would be bound up in such a proceeding.[330] However, the societal interests of the First Amendment would not be served—even if such an individual did happen to make some observations on matters of political or public import—if he never communicated them to the public. Hence, to ensure the fulfillment of those interests, we should also require that "qualifying" information be sought *for the purpose* of disseminating it to the public, and not just for individual consumption or dissemination to a limited audience selected for personal reasons.[331]

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[329] *See, e.g.*, SMOLLA, *supra* note 29, at 18-22.1 (observing that "[c]ourts are increasingly sophisticated in dealing" with certain issues regarding determinations of public concern in the employee speech area). Moreover, Professor Drechsel concluded that in determining the question of whether speech is of "public concern" in the defamation context, courts have given heavy consideration to factors similar to two other minimum requirements I am proposing for an information-gathering right: the extent to which the pertinent information was publicly disseminated, and the professional status of those disseminating it. *See* Drechsel, *supra* note 328, at 20–22; *see infra* notes 329–39 and accompanying text. In a similar way, these additional factors would likely serve to ameliorate definitional difficulties in the information-gathering context.

[330] Even if our hypothetical person had no actual interest in such "public" matters but rather was solely seeking the "salacious details," as a practical matter it would be impossible to screen an individual's request for access to governmental information to make sure it was solely for the "political" or "public" issues raised by that information.

[331] *Cf.* Anderson, *supra* note 1, at 469 (With respect to the institutional press, "[c]ommunication to a single individual, or even a small group of individuals, usually is not thought of as journalism. 'Press' assumes communication to a mass audience, or at least a general audience, about matters of common interest."). While one could object that the Court has never made an "intent to disseminate" an explicit condition of showing

Moreover, such an "intent to disseminate" requirement for receiving First Amendment protection for information gathering is already well established in the law, albeit not by the Court itself and for a much narrower purpose than is being proposed here. As explained earlier, despite the Court's decision in *Branzburg*, declining to create a specific testimonial privilege for journalists in criminal investigations, lower courts have continued to recognize a First Amendment journalists' privilege against compelled production of confidential sources and work product.[332] But in order to be treated as a "journalist" entitled to invoke such protection, courts generally require that the information at issue must have been acquired as part of a process that was intended to culminate in the dissemination of news to the public.[333] Thus, journalists do not receive such special protection because they are part of an institution that is favored by the Constitution, but rather because they are engaged in a process or function designed to facilitate the societal purposes of the First Amendment. For similar reasons, such an "intent to disseminate" would also appear to be an appropriate prerequisite for invoking a general right to gather information.

Lastly, merely requiring that a person claiming such a right have an intent to disseminate their information would not appear to be sufficient, for the simple reason that it would be too difficult and undesirable to police a person's "intent" in this regard.[334] Moreover, allowing any individual wishing to obtain "public"

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a special solicitude for speech on matters of public concern, as described earlier the extent to which speech was communicated publicly has been one factor courts might look at in determining the public character of speech. *See supra* note 326 and accompanying text. But more importantly, when one is considering a social quid pro quo for extending First Amendment protection to conduct antecedent to that speech, a public dissemination requirement would appear to be entirely appropriate in the information-gathering context.

[332] *See supra* notes 98–99.

[333] As one court put it:

> "[T]he critical question in determining if a person falls within the class of persons protected by the journalist's privilege is whether the person, at the inception of the investigatory process, had the intent to disseminate to the public the information obtained through the investigation." . . . In contrast, a person who "gathers information for personal reasons, unrelated to dissemination of information to the public, will not be deterred from undertaking his search simply by rules which permit discovery of that information in a later civil proceeding."

In re Madden, 151 F.3d at 129 (quoting von Bulow v. von Bulow, 811 F.2d 136, 143 (2d Cir. 1987)). *See generally* Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371 (2003) (discussing various approaches to identifying the "press" eligible to claim a journalists' privilege, and proposing "functional definition" of whether the claimant is engaged in a defined "process of journalism").

[334] *Cf.* BAKER, *supra* note 252, at 237 (questioning "offensive" rights of access to information under the First Amendment in part because "[w]hen an individual claims an offensive privilege, such as access to a prison, it is difficult for the state and sometimes

information to invoke a constitutional right to do so by simply alleging an intent to publish that information would pose dangers of creating an unmanageably broad right similar to a right to know. Hence, to create a workable right while at the same time making it meaningful, it would also seem appropriate to require certain bona fides of persons asserting it.[335] These should be designed to provide assurance both that the information sought would indeed be widely disseminated, and also that it would be collected in a reasonably proficient and responsible manner (to ensure the quality of the information and that it was collected in a manner likely to create the least amount of conflict with other recognized interests). In this regard, courts that have allowed persons to invoke the journalist privilege described above have also taken care to ensure that such people are bona fide news reporters.[336]

Probably the most reliable indicator that a person seeking information was doing so for the purpose of disseminating it to the public would be their membership in a group or organization whose recognized *function* was to obtain information for the purpose of public dissemination. Thus, journalists employed by traditional print and broadcast news organizations would certainly qualify, as presumably would free-lance journalists who could demonstrate a connection to news publishing organizations or other credentials similar to their employed counterparts. Moreover, academic or scientific researchers employed by institutions of higher learning or the government would also presumably qualify assuming adherence to their traditional norms of publishing their research to interested communities in their fields.[337] And researchers employed by modern non-governmental organizations, such as public policy groups or think tanks

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difficult even for the person seeking access . . . to know whether the visit will move that person to write or lecture about it in the future").

[335] *See, e.g.*, Saxbe v. Wash. Post Co., 417 U.S. 843, 873–74 (1974) (Powell, J., dissenting) (addressing government's concern in a prison access case that "[a]ny individual who asserts an intention to convey information to others might plausibly claim to perform the function of the news media and insist that he receive the same access to prison inmates made available to accredited reporters" by arguing that establishing a reasonable definition of the press "should not present any constitutional difficulty").

[336] *See, e.g.*, *In re Madden*, 151 F.3d 125, 130 (3d Cir. 1998) (asserting that "[a]s a creative fiction author, [a professional wrestling commentator's] primary goal [was] to provide advertisement and entertainment—not to gather news or disseminate information"). Moreover, to the extent courts have begun extending the journalists' privilege to other information gatherers such as academic researchers or individual book authors, they also appear to take care to ensure that such persons have some bona fides of performing a legitimate information- gathering function. *See supra* note 218.

[337] *See* discussion *supra* note 46. As discussed in note 46, whether a privately-funded scientist, for instance, who performed research with no intent to publish her findings would qualify for information-gathering protection is an interesting question that is beyond the scope of this Article.

whose mission included the research and publication of special studies or reports, would likely also qualify.[338]

This is not to say that only individuals affiliated with professional institutions or organizations could qualify for this constitutional right. Presumably, as with the journalist privilege, virtually any person (such as an individual book author) who could demonstrate a legitimate purpose to acquire and disseminate information of public concern by establishing some bona fides of formal training, experience, or other credentials to engage in such work (such as membership in a recognized association having established standards of conduct to guide their work),[339] would be entitled to invoke a First Amendment right to gather information without undue governmental interference. But once again it is important to note that such a right would not guarantee any of the foregoing persons access to the information sought. It would simply give them a right to have a court assess whether society's interest in enforcing certain laws or government actions outweighed in a given case society's competing interest in obtaining the information at issue.[340]

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[338] *See supra* note 47; *see also* Frederick Schauer, *Principles, Institutions and the First Amendment*, 112 HARV. L. REV. 84 (1999) (arguing for a more institution-specific approach to free speech doctrine in part to recognize various important functions fulfilled by different institutions in our society).

[339] *Cf., e.g.*, Berger, *supra* note 333, at 1404 n.192 (compiling codes of ethics for various journalism associations).

[340] Of course, establishing under what conditions a First Amendment right can be invoked is only part of the battle. The other important questions then become what standard of review or scrutiny a court would use to assess the claimed right against competing interests asserted by the government, and what competing interests would be sufficiently important to overcome the asserted right. *See generally* Stone, *supra* note 96 (arguing that the Court has properly applied different levels of scrutiny to content-neutral regulations of speech (albeit without sufficient openness and explanation), including general regulations of conduct that incidentally burden speech, depending primarily on the extent to which such regulations limit the opportunities for free expression and the preservation of a robust public debate). However, since the primary purpose of this Article has been to make sense of the disparate circumstances under which the Court has or has not recognized a right to gather information under the First Amendment, and to suggest a more cohesive and principled scheme for making these determinations, a detailed consideration of these additional issues is beyond the scope of this present effort. Professor Stone and others might properly ask, however, why all this discussion of an information-gathering "right" when the Court in practice might apply First Amendment scrutiny under its current jurisprudence to regulations of conduct thought to substantially restrict speech in an incidental manner? While this would be an excellent question that would deserve much more of a response than I can provide here, I will offer briefly what I consider to be some of the more important answers. In practice the Court both recognizes as implied rights conduct thought to be essential to make the free speech guarantee meaningful, *see supra* notes 35–38 and accompanying text, and, as I have argued in this Article, has also incorrectly used the rhetoric of rights (or "no rights" to be more precise) to avoid difficult constitutional questions about information gathering

Having proposed, then, the foregoing *minimum* requisites for invoking a First Amendment right to gather information,[341] it remains to examine on what basis

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rights as illustrated by *Pell-Saxbe* and *Houchins*. Given the importance of information-gathering conduct to enhancing the quality or substance of speech (in addition to merely enhancing the opportunities for, or quantity of, speech), I believe such conduct is important enough to First Amendment values to take its place as one of the explicitly recognized, implied First Amendment rights (albeit one of more limited scope). Conversely, I believe the Court should be forced to deal explicitly with the important societal interests that may be in conflict in cases like *Pell-Saxbe* and *Houchins*, and not merely avoid those questions by asserting that information gathering may be a "right" in some contexts but not in others. In a related vein, the various "incidental burden" analyses employed by the Court that depend on its unstated perceptions about the severity of the effects of conduct regulations on speech, all too often create an invisible screen behind which it can silently balance the competing societal interests at stake in deciding whether or not to employ First Amendment scrutiny at all (and at what level), instead of being forced to explicitly recognize the First Amendment values inherent in certain speech-related information gathering activities and then balance those interests against the competing societal concerns. Moreover, to the extent certain information-gathering conduct is or is not recognized as a First Amendment right, to that extent will members of society receive better notice as to what conduct in this area is constitutionally protected and what is not (instead of trying to predict these outcomes under the Court's current obscure approaches to content-neutral regulations of speech that Professor Stone describes so well).

[341] This is not to suggest that additional limitations on invoking such constitutional protection would not be appropriate or desirable. For instance, I have already discussed how an affirmative right of access to government information might cause special problems of administration. *See supra* notes 251–52. In order to prevent the First Amendment from becoming a Freedom of Information Act, and to assist judges in making delicate decisions about the competing public interests in receiving certain information versus potential harms from disclosure, certain prudential limitations on invoking a right of access in this context might be appropriate. First, in order to avoid disruptive and burdensome "fishing expeditions" from bona fide investigative journalists, for example, it might be in order to require those asserting an information-gathering right to first exhaust any statutory or common law rights that may be available to obtain the desired information. *See supra* notes 258–62. Second, it might be appropriate to require that the desired information be described with a higher level of specificity or particularity than may ordinarily be required to reduce the burden of overly broad requests for information and to assist judges in evaluating the competing interests in disclosure. Finally, such actions might be dismissible on the basis of a prima facie showing by the government of a legitimate interest in non-disclosure that could be done *in camera* (such as national security or individual privacy concerns), provided that some plausible assertion of potential harm was made. Additionally, outside of the context of government information and with respect to alleged burdens on information-gathering activities from laws of general application, *see supra* notes 284–302 and accompanying text, it might be appropriate to refuse to recognize an information-gathering defense based on serious violations or breaches of criminal or civil laws, or even serious ethical lapses or misconduct by the party asserting such a defense.

such a right can be "fairly implied" from the text of that Amendment.[342] Clearly, basing the right described above on the Speech Clause would not be a good fit. While it might be reasonable to argue that a right to "speak" fairly implies a right to gather information necessary to engage in meaningful speech, to distinguish the societal from the individual purposes for recognizing such a right it would be necessary to require that speech concern matters of public interest and be the subject of broad dissemination. But once public dissemination of such expression is required, it more realistically becomes the province of the Press Clause. The basic idea underlying the "press" and the main reason it is distinguished from "speech" in the First Amendment, is that "freedom of press" implies a vehicle for the wide dissemination or publication of information.[343]

Moreover, while information that is "published" in our society by the multitude of technological means now available is certainly not always limited to

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On the flip side of the coin, I do not mean to suggest that individuals or groups failing to meet the criteria suggested in this Article for invoking a right to gather information would have no First Amendment protection were the government to purposefully target their information-gathering activities in order to suppress certain speech. In such cases, the government action could be viewed as an indirect restraint on the speech itself and subject to the First Amendment scrutiny applicable to restrictions on such speech. *See supra* notes 196 and 203–04, and accompanying text.

[342] *See supra* note 263. As noted elsewhere in this Article, *see supra* notes 28, 293, and 300, other commentators have argued for special First Amendment protections for the press with respect to their newsgathering or other press activities. *See generally* Berger, *supra* note 333. Naturally, such commentators have proposed different tests for identifying the "press" that is eligible to receive such protections. As might be expected, several of these tests also contain requirements similar to those I am proposing here with respect to a more general right to gather information under the First Amendment. *See, e.g.*, Berger, *supra* note 333, at 1396–416 (discussing various tests and proposing that an individual is " 'engaged in journalism' when he or she is involved in a process that is intended to generate and disseminate truthful information to the public on a regular basis"); John K. Edwards, *Should There Be A Journalists' Privilege Against Newsgathering Liability?*, 18 COMM. LAW. 8, 13 (2000) (proposing a general newsgathering privilege from civil liability if, in addition to other requirements, "the conduct made the basis of the action (1) constituted an activity routinely associated with traditional . . . newsgathering efforts, (2) was engaged in for the sole purpose of furthering publication of news . . . , and (3) related to a matter of legitimate public concern and interest").

[343] *See supra* note 331; *see also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 799–800 (1978) (Burger, C. J., concurring) ("To conclude that the Framers did not intend to limit the freedom of the press to one select group is not necessarily to suggest that the Press Clause is redundant. The Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs, while the Press Clause focuses specifically on the liberty to *disseminate* expression *broadly* and 'comprehends every sort of publication which affords a vehicle of information and opinion.' ") (emphasis supplied) (quoting Lovell v. Griffin, 303 U.S. 444, 452 (1938)).

information of public concern or importance,[344] it also seems reasonable to conclude that when the Framers adopted the Press Clause the dissemination of such information was at the heart of their intent.[345] This was definitely the view of the various dissenting Justices in the newsgathering cases of *Branzburg*, *Pell-Saxbe* and *Houchins* who argued for a societal or structural reading of press freedom, a view that was not disputed by the majority in any of those cases. Where the Court went awry in my opinion was in attributing a similar reading to the Speech Clause in *Richmond Newspapers*, at least as to a public right to obtain information about criminal trials.[346]

Finally, it simply seems more reasonable to imply a right to gather information from the concept of "freedom of the press" than "freedom of speech." This is especially true if press freedom, as Justice Stewart seemed to believe, was intended to provide protection to traditional news institutions. Obviously such enterprises must gather information in order to earn their daily bread and butter. But even if, as most members of the Court have seemed to believe, freedom of the press is basically equivalent to the freedom to publish, the act of publication itself seems to imply a more structured process that frequently involves the acquisition of information. In other words, when people take the additional time and effort necessary to publish information, it is often because such activities were part of a process that involved a more deliberate effort in the beginning to obtain that information and prepare it for dissemination. Thus, it would not appear unreasonable to read the Press Clause as encompassing antecedent information-gathering conduct while taking a different view with respect to the Speech Clause.

In sum, the Court has been understandably reluctant to draw any distinctions between the Speech and Press Clauses in its First Amendment jurisprudence, since all parties (regardless of whether or not they disseminate valuable information to the public) are entitled to an equal right to express themselves.[347] However, when it comes to extending constitutional protection to antecedent conduct for the purpose of promoting important societal interests, there is good reason to avoid an "all or nothing" approach and accord certain rights to a discrete subset of the population which society relies upon to gather and disseminate valuable information in a responsible way. And such a proposal is not just

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[344] Indeed, it might be fair to assert just the opposite with respect to much expression that is "published" on the Internet.

[345] *See generally Origins of the Press Clause*, *supra* note 28 (arguing that in adopting the Press Clause the Framers envisioned a structural role for the freedom of the press by encouraging the dissemination of information of a political character).

[346] *See supra* notes 263–73 and accompanying text.

[347] *See, e.g.*, BAKER, *supra* note 252, at 240 ("Claims that the press has greater rights than private individuals to communicate information or opinion are unjustifiable.").

supported by policy considerations, but by a reasonable interpretation of the Press Clause of the First Amendment.

However, this interpretation is not based on the Court's traditional approach of treating that clause as a superficial adjunct of the Speech Clause, but rather on a reinvigorated and expanded interpretation of it in light of modern needs to facilitate a robust flow of valuable information to the public. Accordingly, "freedom of the press" should not be interpreted as being limited to one enterprise that historically was the principal user of a particular publication technology (i.e., news organizations). Rather, it should be read as according First Amendment protection to the gathering of all types of important public information, and to their dissemination to the public via the wide array of publication technologies available today.

V. CONCLUSION

Due to the case-by-case nature of constitutional adjudication, it is inevitable that broad and cohesive principles in an area of constitutional law will emerge slowly. However, the fragmented and inconsistent principles that have emerged governing a right to gather information denigrate core First Amendment values (in particular the interest of the public in receiving important information about the operation of their government), and more recently threaten to eliminate any sort of meaningful protection for the gathering of important information about other public affairs. I have sought to demonstrate why and how the Court has been ambivalent about extending First Amendment protection to conduct antecedent to speech, and also how that ambivalence has contributed to an inadequate and internally inconsistent legal regime in this area.

To create a First Amendment right to gather information that is both meaningful and workable, as well as consistent in application across all types of information regardless of source (whether governmental or not), this Article has outlined some preliminary proposals that might be considered. To strike an appropriate balance between society's need for information on which to base important decisions of governance and public policy, and its interest in preserving other important interests from undue conflict that a more "conduct-laden" First Amendment right would be likely to engender, three minimum threshold showings for invoking such a right have been proposed. Thus, the information sought must be of legitimate public concern, it must be gathered with a view to subsequent dissemination to the public (after editing, analysis, etc.), and it should be limited to those persons or groups whom society recognizes as having a legitimate information-gathering function as part of their purpose or mission.

Moreover, the most reasonable doctrinal basis for such a right would be the Press Clause of the First Amendment. This clause evidences the Founders' desire to ensure a robust flow of information and ideas to the public, by protecting more of a process of expression than just the expressive acts themselves. Thus, the

information-gathering right I have proposed would rely on a reinvigorated interpretation of the First Amendment, one that acknowledges the Press Clause does have a different role to play in some areas of expression than the Speech Clause (and is not merely redundant as the current wisdom seems to assume). And the Press Clause would not only continue to play a role in protecting the gathering and reporting of "news" (as has traditionally been the case), but serve society's need for facilitating flows of other types of important information as well.